TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 178.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND AND OHIO RAILROAD COMPANY, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED DECEMBER 31, 1896.

(17,241.)

(17,261.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND AND OHIO RAILROAD COMPANY, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from Louisville law and equity court, filed Dec. 6, 1888	1	1
Caption	2	1
Petition in equity	2	2
Summons and marshal's return thereon	23	13
Order filing exhibits by plaintiff	24	14
Exhibit "A," filed by plaintiff—Mortgage, July 2, 1879	24	14
"B," filed by plaintiff—Lease, July 28, 1879	34	20
"C," filed by plaintiff—Mortgage, July 28, 1879	44	25
"D," filed by plaintiff—Contract, January 23, 1880	48	27
Affidavit of A. L. Schmidt and order filing it	54	31
Amended petition	55	31

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 30, 1899.

	Original.	Print.
Action set at rules and postponed	55	31
Order noting amended petition of record	56	32
Amended petition	57	32
Summons on amended petition	57	32
Marshal's return on summons	58	32
Order noting amended petition of record	58	32
Answer of L., C. & L. R'w'y Co. and order filing it	58	33
Notice and motion to refer to the commissioner	60	33
Order filing demurrer to petition and motion for rule against plaintiffs to file bonds, &c	60	33
Notice	60	34
Demurrer to the petition	61	34
Order to make the Northern div. C. & O. R. R. Co. defendant	61	34
Demurrer to petition overruled	61	34
Leave to amend petition by interlineations	61	34
Motion to refer to commissioner sustained and action referred to the commissioner	61	34
Amended petition and order filing it and plaintiffs produced in court bonds sued on, &c	62	35
Summons and return on amended petition	64	36
Order filing amended petition	64	36
Defendant moved to set aside order of reference	64	36
Amended petition	65	36
Motion to set aside order of reference overruled	65	37
Rule against defendant L., C. & L. Railway Co. to produce to commissioner quarterly returns	66	37
Marshal's return on rule	66	37
Order filing exhibits and filing answer of J. B. Wilder, &c	66	37
Exhibit marked "A 1"—Statement showing net earnings accruing to L., C. & L. R'y, &c., from December 1, 1882, to September 30, 1885	68	38
Exhibit marked "A 2"—Statement showing net earnings accruing to L., C. & L. R'y, &c., from October 1, 1885, to October 31, 1887	71	39
Answer of J. B. Wilder	73	41
Order filing affidavit and motion to make rule absolute	74	41
Affidavit of A. L. Schmidt	74	41
Motion to strike affidavit from files and motion to discharge rule, and affidavit of A. Barnett, &c	75	42
Action submitted	77	43
Order filing opinion of court, motion to make rule absolute overruled, motion to strike affidavit from files overruled, and motion to discharge rule sustained, &c	77	43
Opinion of the court, May 24, 1886	78	43
Opinion of the court, October 11, 1896 (?)	81	45
Order filing bill of exceptions	82	46
Bill of exceptions	83	46
Amended petition	83	46
Judge's certificate to bill of exceptions	87	48
Action set at rules, motion to set aside order of reference, and motion submitted	87	48
Motion for rule against defendant to file quarterly returns	88	48

	Original	Print.
Motion to remand action sustained; motion to submit action and motion to set aside order of reference overruled, and order for the defendant to produce to the commissioner quarterly returns	88	49
Order for defendant to produce to commissioner statement, &c	89	49
Exceptions of defendant to report of commissioner and order filing same, and leave to take proof in support of exceptions	90	49
Plaintiff's exceptions to report of commissioner and order filing same	92	50
Motion to quash report of commissioner	96	53
Action set at rules; leave to retake depositions	97	53
Motion to quash report of commissioner overruled	97	53
Clerk's certificate	98	53
Statement	99	54
Transcript from Louisville law and equity court, filed Aug. 13, 1892	100	54
Caption	100	54
Orders: Set at rules, filing additional exceptions to commissioner's report; leave to cross-examine; assignment	100	55
Exceptions	100	55
Orders postponing	101	55
Orders postponing and filing amended petition	103	56
Amended petition	103	56
Order to submit	103	56
Judgment	104	57
Orders filing notice of motion to modify, &c., and objection	106	57
Notice	106	58
Order to assign case	107	58
Orders: Motion overruled, reference, and filing report	108	58
Report of R. E. Sewell	109	60
Orders: Revivor, filing amended petition	118	69
Amended petition	118	69
Orders filing exceptions; motion to confirm and assign	119	69
Exceptions	120	70
Order filing additional exceptions	121	70
Motion to set aside order of February 3, 1891	121	70
Order filing affidavits	121	70
Additional exceptions	121	71
Affidavit of R. E. Sewell	123	72
Affidavit of J. W. Baird	129	75
Orders filing affidavits and two copies of judgment	131	76
Orders: Objection and exception and submission	131	76
Affidavit of R. E. Sewell	131	76
Orders to set at rules and remand	133	77
Order filing opinion	134	77
Opinion, February 24, 1891	134	77
Judgment	137	79
Order filing notice and motion to strike out name from record	138	79
Notice	139	80
Order filing report of R. E. Sewell	139	80
Report of R. E. Sewell	140	80
Order amending order of reference, &c	205	138
Orders filing exceptions and leave to file additional exceptions	206	138
Exceptions	206	139

	Original.	Print.
Motion to correct order of February 1, 1892, and set aside	209	140
Order assigning	210	140
Order to set aside	210	140
Orders filing exceptions and assigning action	210	141
Exceptions	211	141
Orders: Motion to set aside order of March 9, 1891, and to confirm first report of Sewell, No. 1; defendant objects; order read	211	141
Order to submit	212	141
Supplemental report of R. E. Sewell	213	141
Order filing opinion	214	143
Opinion, May 9, 1892	214	143
Order filing report *nunc pro tunc*; order to submit	220	145
Report	221	145
Clerk's certificate	236½	172
Judgment	237	172
Allowance of appeal	239	173
Defendant's depositions	239	174
Deposition of Charles Haydon	239	174
Edward Rowland	240	174
Albert Fink	248	178
Milton H. Smith	260	184
W. H. McDoel	274	191
F. P. Schmidt	281	195
J. K. McCracken	285	197
Exceptions to Sewell's report	299	204
Clerk's certificate	301	205
Statement	302	206
Order continuing for oral argument	303	206
Order: Cause argued and submitted	304	206
Order: Response filed	304	207
Judgment	304	207
Order moving for extension of opinion; time for filing opinion extended	305	207
Petition for extension of opinion	305	207
Order filing petition for rehearing; also filing response, and cause submitted	310	210
Response to petition for rehearing	311	210
Response by court overruling the petition for rehearing and extending opinion	317	213
Transcript from Louisville law and equity court, filed Aug. 22, 1895	318	213
Caption	318	213
Order filing mandate and opinion of court of appeals	318	214
Order filing notice	319	214
Motion to set aside final judgment and motion for rule against defendant	310	214
Order submitting motion	319	214
Motion for rule overruled and order directing money to be paid into court and order awarding rule against defendants	319	214
Motion for rule against defendant to report amount of net earnings, &c	320	214
Return on rule	320	214
Order filing response to rule	321	215

	Original.	Print.
Order to assign	321	215
Response	321	215
Order to postpone	322	215
Order filing opinion	323	216
Order awarding rule against defendant to report amount of its net earnings, &c	323	216
Motion to strike response from files	323	216
Opinion, June 18, 1894	324	216
Return on rule	324	217
Order to postpone	325	217
Order filing response to rule	325	217
Motion to set aside so much of order for rule as allows company credit; motion to make response more specific; motion to strike response from files; defendant objects; order directing responses to be heard together, and order to submit	325	217
Response	326	217
Order filing opinion	327	218
Motion to make response more specific overruled; motion to strike response from files overruled	327	218
Opinion, December 17, 1894	327	218
Order: Time to file reply	334	221
Order filing response	334	222
Response	334	222
Motion to withdraw reply to response	335	222
Motion to file amended and supplemental petition	336	223
Motions assigned for hearing	336	223
Order to postpone	336	223
Motion to withdraw reply and motion to file amended and supplemental petition overruled and leave given to file bill of exceptions	336	223
Order filing bill of exceptions	336	223
Order granting appeal	337	223
Bill of exceptions	337	223
Reply (not set out)	337	223
Amended and supplemental petition	337	224
Judge's certificate to bill of exceptions	360	235
Schedule for record	360	235
Clerk's certificate	361	235
Statement	361	236
Summons on appeal	362	236
Return on summons	363	236
Order: Affidavit filed and motion to advance cause and set same for oral argument	363	237
Affidavit of A. L. Schmidt	363	237
Order advancing cause	364	237
Argument and submission	365	237
Judgment	365	238
Order filing petition for modification of opinion	366	238
Petition for modification of opinion	366	238
Supplemental petition for modification	401	255
Order filing reply to petition for rehearing	401	255
Reply to petition for modification	402	256
Order: Petition for modification overruled	408	259

	Original	Print.
Transcript from Louisville law and equity court, filed Nov. 11, 1896.	409	259
Caption	409	259
Order filing notices	409	259
Order filing opinion and mandate of the court of appeals	410	259
Order filing affidavit	410	260
Motion for rule against L. & N.; motion to refer action to commissioner, and motion submitted	410	260
Notice	411	260
Notice	412	261
Mandate	414	262
Affidavit of Adolph Schmidt	414	262
Order filing opinion	435	272
Opinion, October 3, 1896	435	272
Motion for rule against L. & N. R. R. Co. and motion to refer action to commissioner overruled	467	288
Order granting appeal	468	288
Schedule	468	288
Clerk's certificate	469	288
Statement	469	289
Order filing notice and moving court to advance case for hearing, and case submitted on motion	470	289
Order: Case set for hearing	471	290
Order advancing case set aside	471	290
Order submitting	471	290
Motion to advance case overruled	471	290
Order submitting	471	290
Judgment	472	290
Transcript from Louisville law and equity court, filed April 19, 1898.	473	291
Caption, parties, and mandate	473	291
Order filing opinion; order on motion setting aside judgment; order renewing motion for rule, &c.	474	291
Rule	476	293
Return on same	477	293
Order filing response to rule; order to assign for hearing	477	293
Response	478	293
Order filing affidavit, and opinion of court of appeals; order refiling affidavit; order on motion to make rule absolute; order on reading said opinion and affidavits on hearing of rule and response thereto; order to postpone	482	295
Affidavit of A. L. Schmidt	483	296
Affidavit of Adolph Schmidt	487	298
Order to submit motion to make rule absolute	507	308
Judgment	507	308
Opinion, April 2, 1898	510	309
Supersedeas bond	516	312
Supersedeas	520	315
Return on same	521	315
Clerk's certificate	522	315
Statement	522	316
Endorsement on record	523	316
Order to submit on motion to affirm judgment as a delay case	524	316
Order refusing to entertain said motion	524	317

	Original.	Print.
Order filing notice to submit on motion to affirm judgment as a delay case	525	317
	525	317
Judgment	526	317
Agreements as to parts of record to be left out	532	320
Writ of error	533	321
Bond	535	322
Power of attorney	536	322
Assignment of errors and prayer for reversal	539	323
Clerk's certificate	540	324
Citation	541	324
Proof of service of citation		

1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 27th day of October, A. D. 1898.

Present: Chief Justice Joseph H. Lewis, Judges James H. Hazelrigg, Thomas H. Paynter, A. R. Burnam, B. L. D. Guffy, George Du Relle, and J. D. White.

LOUISVILLE & NASHVILLE RAILROAD Company, Appellant,
vs.
A. L. SCHMIDT, in His Own Right and as Trustee for the Bondholders of the Northern Division of the Cumberland and Ohio Railroad Company, &c., Appellees.

Appeal from the Law & Equity Division of the Jefferson Circuit Court.

Be it remembered that heretofore, to wit, on the 6th day of December, A. D. 1888, Adolph Schmidt, &c., as appellants, by their counsel, filed in the office of the clerk of the Kentucky court of appeals and *ex officio* clerk of the superior court of Kentucky a transcript of record in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law & Equity Court.

ADOLPH SCHMIDT, Trustee, &c.,
vs.
2 LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO.

Pleas before the honorable judge of the Louisville law & equity court, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned.

Be it known that heretofore, to wit, on the 12th day of October, 1885, came plaintiffs, by Temple Bodley, attorney, and filed their petition in the office of the clerk of the aforesaid court.

Said petition is in the words and figures as follows, to wit:

Louisville Law & Equity Court.

ADOLPH L. SCHMIDT, Individually and as Trustee for Owners of Bonds of the Northern Division of the Cumberland and Ohio Railroad Company; Jacob Peter, James McCarty, George H. Breed, P. Booker Reed, Eliza S. Reed, Jane M. Reed, Leander S. Reed, W. C. Reamer, and Jacob Krieger, Sr., for Themselves and Other Owners of said Bonds, Plaintiffs,

vs.

LOUISVILLE, CINCINNATI AND LEXINGTON Railway Company, Defendant.

} Petition in Equity.

Adolph L. Schmidt, individually and as trustee under the deed of trust from the Northern division of the Cumberland and Ohio Railroad Company to Joshua F. Speed, Jacob Peter, James McCarty, George H. Breed, James M. Reed, P. Booker Reed, Eliza S. Reed, Leander S. Reed, W. C. Reamer, and Jacob Krieger, Sr., for themselves and all and singular the other holders and owners of
3 the bonds hereinafter described, plaintiffs, state that heretofore to wit, on the 2nd day of July, 1879, the defendant Northern Division of the Cumberland and Ohio Railroad Company, which then was and is a corporation created and duly organized under the laws of the State of Kentucky and authorized thereby to contract and be contracted with, to sue and be sued, acquire, hold, and in anywise alien and encumber property of all kinds, and which then owned and possessed all the property hereinafter mentioned as mortgaged by it to Joshua F. Speed, made and delivered to said Speed, as trustee, a certain deed of mortgage which was duly acknowledged before and recorded by the clerks of Spencer, Shelby, Henry, and Jefferson counties, in said State of Kentucky. By said deed of mortgage, a copy of which is herewith filed and made part hereof, marked "A," said Northern division of the Cumberland and Ohio Railroad Company conveyed to said Speed, as trustee, all the property, rights, and franchises of the said Northern division of the Cumberland and Ohio Railroad Company, including all the right, title, and interest of said company free from all lien, mortgage, or claims of any kind in and to its line of railroad from its point of intersection with the line of road of the Louisville, Cincinnati and Lexington Railway Company, in the town of Eminence and county of Henry and State of Kentucky, through the counties of Henry, Shelby, Spencer and to Bloomfield, in Nelson county, Kentucky, together with all the improvements and appurtenances, right of way, lands adjacent thereto, depots, and lands upon which they are situated and adjacent thereto, machinery, tools, implements,
4 fixtures, furniture, and materials and supplies of every description, so as to vest in the said Joshua F. Speed, trustee, all the right, title, and interest of the said Northern division of the Cumberland and Ohio Railroad Company in and to all the

property owned by it or in which it had any interest at the date of the execution of said deed of mortgage or thereafter to be acquired by the said Northern division of the Cumberland and Ohio Railroad Company. Said conveyance was made to said Speed to secure the payment of three hundred and fifty bonds issued by said Northern division of the Cumberland and Ohio Railroad Company, being for one thousand dollars each, dated the 2nd day of July, 1879, payable twenty years thereafter, and bearing interest at the rate of seven per cent. per annum, payable half yearly. By said deed of mortgage it was provided that all of said property so conveyed should be held by said Speed, as trustee, for the joint and equal security of such persons as might become the legal holders of any of the bonds aforesaid for the security of the principal and interest of each of said bonds without regard to the time at which said holders might become possessed thereof.

And by said deed of mortgage it was further provided: "That in the event of the death, resignation, failure or refusal to act of said Speed, trustee as aforesaid, it should and might be lawful for the Shelby circuit court upon application of parties holding said bonds to the amount of seventy thousand dollars or more, to appoint a trustee or trustees in lieu and stead of said Speed, and that the trustee or trustees so appointed should thereupon succeed to and be vested with all the rights, powers and privileges which were by said deed of mortgage conferred upon said Speed, or intended so to be."

5 Afterwards, on the 28th day of July, 1879, said Northern division of Cumberland and Ohio Railroad Company, lessor and as party of the first part, made, executed, and delivered a deed of lease to the Louisville, Cincinnati and Lexington Railway Company, lessee and party of the second part, which then was and is a railroad corporation created and duly organized by and under the laws of the State of Kentucky and authorized thereby to contract and be contracted with, to sue and be sued, to acquire and hold and in anywise alien and encumber property of all kinds. Said deed of lease was duly acknowledged by said Northern division of the Cumberland and Ohio Railroad Company and said Louisville, Cincinnati and Lexington Railway Company before and recorded by the clerks of the county courts of Spencer, Shelby, Henry, and Jefferson aforesaid.

A duly certified copy of said deed of lease is filed herewith as a part hereof, marked Exhibit "B."

And by said deed of lease it was provided as follows, to wit:

"That for and in consideration of the mutual covenants and stipulations hereinafter contained the said party of the first part does hereby lease to the said party of the second part all that part of the first party's unfinished road-bed, rights of way, with improvements and appurtenances depots and depot grounds, machinery, tools and implements, together with all its property, rights and franchises, including unpaid subscriptions to capital stock, deeds and demands belonging to or in anywise appertaining to the

6 said first party's line of railway from its intersection with the second party's railway at the town of Eminence Kentucky,

thence southwardly through a portion of Henry county and the counties of Shelby and Spencer and to Bloomfield in the county of Nelson and State of Kentucky, for the period of thirty years from the date of full execution hereof; upon the terms, conditions and stipulations hereinafter set out.

First. Under direction of the stockholders of said first party, its president and directors will execute a mortgage (meaning the above-mentioned mortgage) upon all the property, rights and franchises belonging to or in anywise appertaining to said first party's line of road hereinbefore described for the security of three hundred and fifty thousand dollars of mortgage coupon bonds having twenty years to run and bearing interest at the rate of seven per cent. per annum, interest payable on the first days of June and December of each year, all of which is fully set out in said mortgage. Now said bonds and coupons are to be fully prepared, signed and countersigned and made ready for use as in the charter of said first party and said mortgage provided and the same will be delivered to said second party within sixty days after the delivery of this lease.

Second. Said second party hereby binds and obliges itself that said bonds or proceeds of such as are sold shall be used by it in the construction of said first party's line of railway as provided in this lease and for no other purpose whatever. It is agreed that enough of said bonds may be sold or used in and about contracts for work, labor or material to complete said line of railway at not less than eighty-five cents to the dollar and whatever of said bonds
7 or proceeds after deducting all sums due said second party may not be so used shall, after said completion after cancellation of bonds be turned over to said first party and such surplus bonds destroyed.

Third. A fundamental condition of this lease is that if said second party shall not be able to dispose of bonds amounting *to* their face value to two hundred and fifty thousand dollars, the proceeds to be in money, material or labor, by or before the 1st day of September, 1880, then this lease terminates and the parties hereto are released and said second party is to restore to said first party all bonds, provided, however, that no absolute sale of any of said bonds shall be made by said second party unless and until it can place not less than two hundred and fifty thousand dollars in the value thereof in money or its equivalent; and when that quantity of said bonds have been so disposed of by said second party it shall, as soon as practicable and not later than the 1st day of September, 1880, begin the construction of said first party's said line of railway and a failure to begin work within said time shall operate as a termination of this lease. Whenever said two hundred and fifty thousand dollars of said bonds shall have been disposed of as aforesaid this contract becomes absolute and binding on the parties hereto, and the construction of said line of railway from Eminence to Bloomfield shall be commenced, and when the construction of said line of railway is begun the same shall be pushed to completion as rapidly as possible, and a failure on the part of the party of the second part to so complete the same as to allow the safe and regular passage of

trains to and from Eminence and Bloomfield within two years
8 from the commencement of work thereon, shall, at the option of said first party after six months' notice of its election so to do, operate as a forfeiture of this lease. None of said bonds shall be sold with past-due coupons annexed thereto, but before selling all past-due coupons shall be cut off, cancelled and returned by said second party to said first party.

Fourth. When commenced said construction shall be pushed as rapidly as possible with due regard to the greatest economy and the work and superstructure is to be as for a first-class single-track railway with the same guage as the track of said second party's line of railway.

Fifth. It is further agreed that said second party shall furnish all necessary locomotives, engines and rolling stock to operate said line of railway and for the use of same said second party is to receive out of the gross earnings of said first party's line of road the cost of the wear and tear to such engines and rolling stock as may be so furnished. But the first party reserves the right to furnish all, or as much as it can, of said rolling stock and when so furnished said first party shall receive the same compensation therefor as is agreed by said second party on its rolling stock used on said line.

Sixth. It is further agreed and understood that in the operation of said line of railway said second party will make to said first party quarterly returns giving full details of earnings and operating expenses including the expenses of keeping road-bed in order and the net profit arising therefrom shall be applied to the payment of interest and providing for sinking fund and retiring
9 said mortgage bonds. But out of the gross earnings shall be first deducted annually the sum of one thousand dollars which shall be paid to said first party with which to pay the expenses of keeping up its organization and if the net earnings do not prove sufficient to pay the interest and provide for the sinking fund on said mortgage bonds then second party, if all other sources of raising money of said first party proves insufficient will supply the deficiency as far as it may be done by appropriating the net earnings or so much as may be needed on its own lines which may accrue by reason of business coming to it from or over said first party's lines.

This pledge and agreement shall be made effectual by mortgage property executed, acknowledged and recorded and should it become necessary to use any of the net earnings on the lines of the second party to pay said interest and sinking fund or any part of either then all amounts *to* used as well as all moneys paid for said first party by said second party shall be treated as interest-bearing debts, interest at the same rate with said mortgage bonds payable half yearly and to run from date of such payment, the debt and interest to be repaid out of said net earnings thereafter accruing to said first party on its own lines which may be so appropriated consistently with the other premises of this lease and for all sums of money that may become due from said first party to said second party on this or any account a lien is hereby created upon all the

property, rights and franchises of said first party owned or to be acquired in favor of said second party to stand next in priority to said mortgage and bonds for three hundred and fifty
10 thousand dollars as aforesaid, but said second party shall not enforce the collection of said debts or any of them by enforcement of said lien until at least eight years have elapsed from and after the creation of the same.

Seventh. It is further agreed and understood that whenever the net earnings from the leased premises shall be sufficient to pay off the interest and sinking fund on said mortgage bonds for three hundred and fifty thousand dollars, or such portion thereof as is outstanding, and to repay said second party all dues and demands then due or owing, the surplus net earnings, unless used in retiring said bonds as provided in said mortgage, less one-tenth thereof shall be paid over to said first party. The one-tenth of said net earnings to be retained by second party for its own use.

Eighth. It is further agreed and understood that so long as said second party may operate said leased lines of railway no greater rates of charges either for freight or passage thereon, shall be demanded or received than is demanded or received under its regular tariff on its own line of railway for local freight and passage.

Ninth. It is further agreed and understood that said first party, assigns, transfers and sets over to said second party all claims, dues and demands choses in action, unpaid subscriptions to capital stock (except private subscriptions and all evidences thereof) of every kind and character to be by said second party collected by suit or otherwise, with power to settle, compromise, arbitrate or adjudge as to it may seem best. But this agreement and transfer does
11 not become absolute (except as to so much thereof as may be necessary to refund and indemnify to said second party the cost of printing and issuing said mortgage bonds or incidental thereto which is absolute) until said second party give notice in writing to the president of said first party that said two hundred and fifty thousand dollars of said mortgaged bonds have been disposed of as hereinbefore provided, and then and after such notice said second party may at once proceed as provided under this clause of this lease.

Tenth. It is further agreed and understood that this lease is not assignable without the consent of the grantor that during the existence of said lease the second party will pay all taxes, lawfully assessed against said leased premises, the amount thereof to be charged to operating expenses, and at the termination thereof said leased premises shall be restored to said first party in good repair unless the same be extended or renewed by mutual consent, or unless prevented by unavoidable casualty, legal proceedings, or operations at law.

Eleventh. The second party hereby agrees to furnish any means necessary to complete said first party's line of road from Eminence to Bloomfield which may not be derived from the sale of the bonds to be issued by said first party and also to furnish any means necessary to pay any interest which may become due on said mort-

gaged bonds previous to the completion of said first party's line of road which may not be derived from the earnings of said line of road; any means so furnished by said second party is to become a lien debt due to said second party by said first party and pay-
12 able upon the same terms and conditions as heretofore provided as to the other indebtedness.

Twelfth. If said second party be hindered or delayed in beginning or completing said line of railway by act or omission of said first party, or by legal or by equitable proceedings, then the period or periods of such delay shall not be computed as part of the time within which said second party is to do or perform any act or things under this contract."

On the 28th day of July, 1879, the said Louisville, Cincinnati and Lexington railway, as the party of the first part, made, executed, and delivered to the said Joshua F. Speed, as trustee, the party of the second part, a certain indenture of mortgage whereby it was provided as follows, to wit:

"That whereas by authority of an act of the General Assembly of the Commonwealth of Kentucky approved the 18th day of March, 1878, the party of the first part has entered into a contract with the Northern division of the Cumberland and Ohio Railroad Company for the lease, construction and operation of the latter company's line of road from Eminence in Henry county, Ky., through a part of said county, and the counties of Shelby and Spencer, and into Nelson county so far as Bloomfield—all in the State of Kentucky, said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of three hundred and fifty bonds of one thousand dollars each, bearing interest at the rate of seven per cent. per annum payable half-yearly on the first days of June and December and having twenty years to run from the 2nd day of July 1879, to
13 *to* be issued by said Northern division of the Cumberland and Ohio Railroad Company and if all the sources of raising money of said Northern division of the Cumberland and Ohio Railroad Company fail to provide for said interest and sinking fund then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed on its own lines, which may accrue to it by reason of business coming to it from or over the said lines of the said Northern division of the Cumberland and Ohio Railroad Company, and whereas said contract of lease has been fully consummated by action of the stockholders of the first party herein and it is now desired to carry into effect the said stipulation as to said net earnings.

Now in consideration of one dollar cash in hand paid by said second party to said first party, and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern division of the Cumber-

land and Ohio Railroad Company to the said Joshua F. Speed, as trustee aforesaid (who is the trustee for the mortgage made by said Northern division of the Cumberland and Ohio Railroad Company to secure said three hundred and fifty bonds of one thousand dollars each): Conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern division of the Cumberland and Ohio Railroad Company prove insufficient will supply the deficiency so far as it may be done by appropriating and paying over promptly the net earnings, or so much thereof as may be needed, on its own lines, which may accrue by reason of
14 business coming to it from or over said Northern division of the Cumberland and Ohio Railroad Company's lines for the purpose of discharging said interest and sinking fund as they severally fall due."

Said indenture of mortgage was duly acknowledged by the said Louisville, Cincinnati and Lexington Railway Company before and recorded by the clerks of the county courts of said Spencer, Shelby, Henry, and Jefferson counties, and a duly certified copy of the same is filed herewith as a part hereof, marked Exhibit "C."

Afterwards, to wit, on the — day of January, 1880, and after the delivery of said deeds, mortgage, and said last-described indenture of mortgage, the said Northern division of the Cumberland and Ohio Railroad Company, as party of the first part, the said Louisville, Cincinnati and Lexington Railway Company, as party of the second part, and said Joshua F. Speed, trustee, as party of the third part, made, executed, and delivered each to the other a certain contract in writing, wherein it is recited and provided:

"That for and on account of the difficulties of carrying into effect the contract of the parties of the first and second parts hereto, in relation to the lease, construction and operation of the said first party's proposed line of railway from Eminence to Bloomfield, of date the 28th day of July, 1879, said parties have and do hereby agree upon the following changes and modifications of said contract and the mortgage therein named, to take effect when and as soon as this change and modification shall have been duly and properly approved by a majority of the stockholders of each of said
15 companies, and fully executed and recorded in the proper offices when to all intents and purposes the said contract so amended and modified shall be regarded and taken as the true contract and agreement between the parties hereto.

First. Whenever said second party shall be able to dispose of said mortgage bonds provided for in said contract and mortgage amounting at their face value to the sum of $150,000.00 (one hundred and fifty thousand dollars), said bonds numbered from 1 to 150 inclusive, the proceeds in money, labor, or materials, the same may be done, and then this contract as amended and in all its particulars becomes absolute, and the construction of that portion of said first party's line of railway between Shelbyville and Bloomfield shall be commenced and pushed to completion as rapidly as possible; and a

failure to complete said road so as to permit the safe and regular passage of train- between Shelbyville and Bloomfield within two years from the commencement of work thereon, shall, at the option of said first party, after six months' notice thereof, operate as a forfeiture of said lease; but no disposition of any of said bonds shall be made until not less in amount than one hundred and fifty thousand dollars at the face value thereof numbered as aforesaid, can be placed for money or its equivalent.

Second. Not more than two hundred and fifty thousand dollars of the face value of said bonds, numbered from 1 to 250 inclusive, shall be used or disposed of in and about the construction of said railroad between Shelbyville and Bloomfield, and one hundred thousand dollars of the face value of said bonds, numbered
16 from 251 to 350 both inclusive, shall be set apart and faithfully preserved in such manner as the boards of directions of the first and second parties may agree, for the ultimate construction of said first party's road between Eminence and Shelbyville; but said second party shall not be bound to begin the construction or operation of said last-named portion of said railroad until, in the judgment of the board of directors of the said second party, the operation of the same would result in sufficient earnings to pay operating expenses and interest and sinking fund on the amount required to complete the same; and the mortgage heretofore made to Joshua F. Speed, trustee therein, is hereby so modified that the said two hundred and fifty bonds to be used in constructing said railroad between Shelbyville and Bloomfield shall constitute no lien on that part of said company's road between Eminence and Shelbyville until said one hundred bonds set apart for its construction shall have been used for that purpose, and then all of said bonds issued shall be a joint and equal lien on the whole property as set out in the original mortgage: and the said Speed as trustee, is made a third party hereto and shall sign this contract as evidence of his consent to the modifications in this respect of the said mortgage, it being agreed and understood that at this date none of said mortgage bonds have been sold or disposed of, but remain in the hands of said second party, provided that unless the second party shall complete the construction of so much of said party's road as lies between Shelbyville and Eminence with- five years from the
17 1st of September, 1880, then the lease of said last-named part of said road shall determine and terminate at the option of said first party after six months' notice, and in the event of such termination of the lease said bonds, numbered from 251 to 350 both inclusive as aforesaid, and the coupons thereof shall at once be cancelled so as to prevent their circulation, or if the board of the parties aforesaid so order it they shall be destroyed.

Third. Before any of said bonds numbered from 1 to 250 both inclusive, shall be sold or disposed of, each shall have a printed or lithographed endorsement thereon to the effect that none of their coupons have any lien upon the company's property or franchise or line of road north of Shelbyville until the one hundred bonds aforesaid are issued or used, and that portion of said road between

Shelbyville and Eminence shall have been completed and then all of said bonds and coupons shall have a common and joint lien on the whole property.

Fourth. The board of directors of the first and second parties may agree to use second-handed rails in building said road or any part of it, said rails to be sufficient for the safe transmission of trains and to be removed and replaced as fast as they become unsafe. The price of said second-handed rails to be agreed upon by said boards before being used.

Fifth. In all respects in which this contract is inconsistent with the original contract or mortgage said originals are abrogated and the contract as modified and amended by this agreement shall be taken as the true existing contract between the parties."

Said written contract, a copy of which is herewith filed
18 and made part hereof, marked D," was signed and acknowledged by the said Northern division of the Cumberland and Ohio Railroad Company, said Louisville, Cincinnati and Lexington Railway Company, and said Joshua.F. Speed before and recorded by the clerks of the county courts of said Spencer, Shelby, Henry, and Jefferson counties, and the modifications mentioned therein of the contract between defendant The Northern Division of the Cumberland and Ohio Railroad Company and defendant The Louisville, Cincinnati and Lexington Railway Company and of the mortgage executed to said Speed by said Louisville, Cincinnati and Lexington Railway Company were duly and properly approved by a majority of the stockholders of each of said companies.

Plaintiffs say that, in accordance with the provisions of said mortgages, lease, and contract, said bonds and coupons were fully prepared, signed and countersigned, and made ready for use, as in the charter of said Northern division of the Cumberland and Ohio railroad and said first-mentioned mortgage provided, and two hundred and fifty of said bonds of one thousand dollars each were issued and delivered to said Louisville, Cincinnati and Lexington Railway Company within sixty days after the delivery of said deed of lease. In each of said bonds it is provided as follows:

"The Northern division of the Cumberland and Ohio Railroad Company hereby promises to pay Joshua F. Speed, trustee, or bearer the sum of one thousand dollars on the 2nd day of July, 1899, at the Bank of America in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable at the same place on the 1st days of June and December of each year as per coupons annexed on presentation of said coupons. This is one of a series of three hundred and fifty bonds numbered from 1 to 350 both inclusive and lettered A, and is secured by mortgage dated the 2nd day of July, 1879, made, executed and delivered by said Northern division of the Cumberland and Ohio Railroad Company to Joshua F. Speed as trustee, in pursuance of an act of the General Assembly, approved the 18th day of March, 1878. The holder of this bond together with the holders of the others of said series is entitled to a first lien for the equal security of principal and interest of each respectively on all the property, rights and franchises of said Northern

division of the Cumberland and Ohio Railroad Company as also a first lien on the net earnings of the Louisville, Cincinnati and Lexington Railway Company, duly pledged thereto, which may accrue to it by reason of business coming to it over the line of the mortgagor" the said Northern division of the Cumberland and Ohio Railroad Company.

19 Attached to each of the said bonds were blank coupons, each serially numbered from 1 to 40, inclusive, and respectively payable to bearer in the order of said numbers, one coupon on each first day of June and December of each and every year for twenty years after said second day of July, 1879, beginning with the first day of December, 1879.

Afterwards (and before the 1st day of September, 1880) defendant The Louisville, Cincinnati and Lexington Railway Company disposed of so many of said bonds numbered from 1 to 250, both inclusive, as amounted at their face value to two hundred and fifty thousand dollars ($250,000), the proceeds being money, materials, and labor, and gave notice thereof in writing to the president of said Northern division of the Cumberland and Ohio Railroad Company, each of said bonds having printed endorsement thereon to the effect that none of them or their coupons should have any lien upon the company's property or franchise or line of road north of Shelbyville until the one hundred bonds to be used in the construction of said railroad between Eminence and Shelbyville were issued or used and that portion of said road between Eminence and Shelbyville should have been completed.

Said two hundred and fifty bonds were for a valuable consideration sold and transferred by said Louisville, Cincinnati and Lexington Railway Company to various persons and were brought and sold upon the market, and the plaintiffs, together with many other persons unknown to said plaintiffs, became the purchasers and are now the owners and holders of said bonds as follows:

20 Adolph L. Schmidt, individually, of 31 of said bonds.
Jacob Peter, of 5 of said bonds.
James McCarty, of 3 of said bonds.
George H. Breed, of 2 of said bonds.
James M. Reed, of 5 of said bonds.
P. Booker Reed, of 21 of said bonds.
Eliza S. Reed, of 5 of said bonds.
Leander S. Reed, of 22 of said bonds.
W. C. Reamer, of 6 of said bonds.
Jacob Krieger, Sr., 28 of said bonds.

Plaintiffs state that none of the interest or the coupons attached to said bonds, which accrued due on or after the 1st day of December, 1883, has been paid to any of the plaintiffs, and they are informed, believe, and state that no such payment has been made to any other owner of said bonds or coupons.

Plaintiffs state that they demanded of the said Louisville, Cincinnati and Lexington Railway Company the payment of all said accrued interest and coupons upon said bonds, but that the same has been refused by both the said Louisville, Cincinnati and Lex-

ington Railway Company and which denies any liability on its part to pay them or any of them, and has informed plaintiffs that it will not pay any of said interest or coupons by said Northern division of the Cumberland and Ohio Railroad Company; that plaintiffs are informed and believe and they state that said Louisville, Cincinnati and Lexington Railway Company has received net earnings of the said Northern division of the Cumberland and Ohio railroad which have never been applied to the payment of the unpaid and accrued interest or coupons aforesaid or to provide the sinking fund aforesaid, and said Louisville, Cincinnati and Lexington Railway Company claims that besides the said net earnings on its own lines from business coming to it from or over the
21 lines of said Northern division of the Cumberland and Ohio railroad, all other sources of raising money of said Northern division of the Cumberland and Ohio Railroad Company have proven insufficient to pay said interest or to provide for said sinking fund. They further say that said Louisville, Cincinnati and Lexington Railway Company has received large net earnings on its own lines, which have accrued to it by reason of business coming to it from and over said Northern division of the Cumberland and Ohio Railroad Company's lines and of which the Louisville, Cincinnati and Lexington Railway Company by the lease, mortgages, and contract aforesaid agreed to make the said Northern division of the Cumberland and Ohio Railroad Company and the said trustee quarterly returns.

Plaintiffs say that heretofore, to wit, on the — day of ——, 18—, said Speed died, and afterwards, upon application to the Shelby circuit court by Jacob Peter and others, who then owned and held over one hundred of said thousand-dollar bonds, said court appointed the plaintiff Adolph L. Schmidt trustee in lieu and stead of said Speed, and invested him with all the rights, powers, and privileges which were by said deeds of mortgage conferred upon said Speed or intended so to be.

Plaintiffs state that said Louisville, Cincinnati and Lexington Railway Company has never made, but has refused to make, returns, as were provided for, as aforesaid, either to the said Northern division of the Cumberland and Ohio Railroad Company or either of the trustees herein mentioned, although plaintiffs say that all of them demanded such returns of said Louisville, Cincinnati and Lexington Railway Company before the commencement of this action.

22 Plaintiffs state that they are ignorant of the exact amount of the net earnings of said Northern division of the Cumberland and Ohio Railroad Company and of the net earnings on the lines of said Louisville, Cincinnati and Lexington Railway Company accruing to it by reason of business coming to it from or over the lines of said Northern division of the Cumberland and Ohio Railroad Company, and the defendant Louisville, Cincinnati and Lexington Railway Company has exclusive knowledge and evidence of all such earnings; but plaintiffs are informed, believe, and state that such earnings applicabale in accordance to the said

deeds, indenture, and contract to the payment of the past-due interest on and coupons attached to said bonds are very large and sufficient to pay a great number or the whole of said overdue interest and coupons.

Plaintiffs state that they are ignorant of the names of some of the owners and holders of said bonds and coupons annexed thereto, who are many and numerous, and it is impracticable to bring them all before the court within a reasonable time, and all such holders have a common interest with the plaintiffs herein, and they pray that said plaintiffs be allowed to prosecute this action for the benefit of all said bondholders.

They say further that the defendants J. B. Wilder and The Louisville, Cincinnati and Lexington Railway Company claim to be the owners and holders of some of said mortgage bonds, and refuse to concur or join with the plaintiffs herein, and are therefore made defendants herein.

Wherefore the plaintiffs pray that this action be referred to the commissioner of this court, with directions to take proof
23 concerning and report the net earnings aforesaid of the Northern division of the Cumberland and Ohio Railroad Company and on the lines of the Louisville, Cincinnati and Lexington Railway Company which may be liable and subjected by order herein to pay the accrued interest and coupons attached to all said bonds; that said Louisville, Cincinnati and Lexington Railway Company be required by order herein to pay all such earnings into court, and that the same be applied to the payment of said interest and coupons, for plaintiffs' costs herein, and for all proper general relief.

TEMPLE BODLEY,
Attorney for Plaintiffs.

Adolph L. Schmidt says he is plaintiff in the foregoing petition, the statements of which are true, as he believes.

Subscribed and sworn to before me by Adolph L. Schmidt this 12th day of October, 1885.

—— ——.

Upon the filing of the foregoing petition there issued thereon from the office of the clerk of said court a summons, and one copy in words and figures as follows, to wit:

The Commonwealth of Kentucky to the marshal of the Louisville chancery court, Greeting:

We command you to summon Louisville, Cincinnati and Lexington Railway Company to answer a petition exhibited against it in our Louisville law and equity court by Adolph L. Schmidt, trustee, &c., 1860, and warn it that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days,
24 if elsewhere in the State, judgment may be rendered by default or proof taken or *or* answer compelled at petitioner's option, and make due return hereof within sixty days from the date hereof.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, at the court-house, in the city of Louisville, on the 12th day of October, 1885.

JNO. H. WELLER, *Clerk*,
By LOUIS SUMMERS, *D. C.*

Executed on Louisville, Cincinnati & Lexington Railway Company October 29th, 1885, by delivering a copy of this summons to M. H. Smith, president thereof.

W. H. BAILEY, *M. L. C. C.*,
By W. E. MONTZ, *D. M.*

And at a court held for the court aforesaid on the 9th day of November, 1885—

Came plaintiff, by counsel, and filed Exhibits "A," "B," "C," and "D" herein.

The said exhibits are in words and figures as follows respectively, to wit:

"Ex. A."

Mortgage from the Cumberland & Ohio Railroad Company to Joshua F. Speed, Trustee, to Secure the Principal & Interest of 350 Bonds of $1,000.00 Each, Dated.

This indenture made and entered into this the second day of July, in the year of our Lord one thousand eight hundred and seventy-nine, between the Northern division of the Cumber-
25 land and Ohio Railroad Company, a corporation duly organized under the laws of the State of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part.

Witnesseth, that for and in consideration of one dollar paid cash in hand by the party of the second part to the party of the first part; and whereas it is provided in the charter of the said party of the first part that it might issue mortgage bonds to complete its road to the extent of fifteen thousand dollars per mile upon all its property, rights, and franchises; and whereas the stockholders and board of directors of said first party have determined to issue such mortgage bonds to the extent of three hundred and fifty thousand dollars, bearing interest at the rate of seven per cent. per annum, interest payable half-yearly, and bonds being of even date with the said mortgage, and to be paid at the end of twenty years from their dates, and have determined that such mortgage shall be executed and bonds issued, by minutes duly entered upon their record books, and have directed the preparation of said bonds; and the same have been prepared, aggregating the said sum of three hundred and fifty thousand dollars, and divided into bonds of the denominations of one thousand dollars each, making three hundred and fifty bonds, numbered from one to three hundred and fifty, both inclusive, and lettered A; all of said bonds having interest coupons annexed thereto, to fall due on the first days of June and December

of each year, interest and principal payable in the city of New York. And the said bonds have been duly executed, and are now about to be delivered for the purpose of being sold in order to complete their line of railway as specified in the lease this day made from
26 said Northern division of the Cumberland & Ohio Railroad Company to the Louisville, Cincinnati & Lexington Railway Company.

Now therefore, for the equal security of each of said bonds at maturity and the payment thereon of interest as the same matures, the said first party has this day bargained and sold, and does hereby bargain, sell, and convey unto the said party of the second part all the property, rights, and franchises of the said Northern division of the Cumberland & Ohio Railroad Company, including all the right, title, and interest of said company free from all liens, mortgage, or claims of any kind, and in and to its line of railroad from its point of intersection with the line of road of said Louisville, Cincinnati & Lexington Railway Company in the town of Eminence and county of Henry and State of Kentucky, through the counties of Henry, Shelby and Spencer, and to Bloomfield, in Nelson county, Kentucky, together with all its improvements and appurtenances, right of way, lands adjacent thereto, depots, and lands upon which they are situated and adjacent thereto, machinery, tools, implements, fixtures, furniture, and materials, and supplies of every description, so as to vest in the said party of the second part all the right, title, and interest of the said Northern division of the Cumberland & Ohio Railroad Company in and to all property owned by it, or in which it has any interest at the date of the execution of this instrument, or hereafter to be acquired by the said first party.

To have and to hold the same to the said party of the second part, his successors and assigns forever. It is expressly to be understood, and it is hereby declared to be the true intent and
27 meaning of these presents that the said second party shall have and hold the premises hereby granted, or covenanted so to be, as trustee for the joint and equal benefit and security of all such persons as may hereafter become the legal holders of any of the bonds aforesaid, and for the security of the principal and interest of each of said bonds without regard to the time at which the said holders may become possessed thereof; provided always that the said first party, its lessees or assigns shall have and retain exclusive possession, control, and management of said premises until default made as hereinafter provided, and possession taken in consequence thereof; and may, with the approval and concurrence of said second party, sell or lease, and make conveyance of any portion of said premises which may be found unnecessary to the working of said road, the proceeds of such sale being reinvested in other real estate subject to the same trust, or in liquidation of so much of the bonds issued hereunder; such reinvestment being made also with the approbation of said second party, but without the purchaser being required to look to the reinvestment.

And provided further, that if said first party shall well and

truly pay the several installments of interest on said bonds, and each of them as the same shall become due, then this indenture shall be void, and of no further effect.

In the event of the failure of said first party to pay any part of any installment of said interest for more than sixty days after the same shall have become due and been demanded at the place where the said interest shall be properly payable, or in the event of
28 its failure to pay any portion of said principal for more than ninety days after the same shall have become due and payable, and been demanded at the place where the same shall be payable; then, and in either event, it shall and may be lawful for the said second party and his successors in the trust hereby created (upon request thereto made in writing by any person holding any of said bonds in the payment of principal or interest of which default shall have been made as aforesaid) to enter upon and take possession of the railroad, property, and franchises hereby granted, or covenanted so to be, and to hold, use, operate, and manage the same for the joint and equal benefit of all the holders of all of said bonds. And upon such default and request made and possession taken, the profits arising from the operation and use of the premises shall be appropriated by the party of the second part as follows, to wit: First, to the payment of the expenses of the trust, including a fair and reasonable compensation to the trustee for his services; second, if there be any surplus remaining then to the payment of the interest in arrears on said bonds; third, if there be still a surplus then to the payment of the accruing interest on said bonds as it falls due, and to the payment of the principal of said bonds as it shall fall due.

But in the event that after such default and request made and possession taken it shall become necessary or desirable to sell the premises in order to the more prompt payment of the interest and principal of said bonds, then it shall and may be lawful for second party (upon request made in writing by persons legally holding said bonds to the extent of a majority of the bonds outstanding) to sell the said premises to the highest bidder upon
29 such terms as, not being inconsistent with this indenture or the tenor or effect thereof, may be determined on by said second party and the person or persons holding said bonds. Said sale may be made for the whole amount of the principal and interest then accrued upon the whole issue of said bonds outstanding, treating the principal as become due by reason of the default in the payment of interest. And the whole purchase-money may be required to be paid by the purchaser in payments not less favorable to him than one-third in cash, and the remainder in one and two years from day of sale, with interest from said day; or the purchaser may be required only to pay in like brief periods the interest then accrued and in arrears and to secure the payment of the principal and accruing interest as they shall become due. But in any sale which may be made a lien shall be retained on the premises to secure the unpaid purchase-money, and there shall likewise be re-

served a power of resale in case of default in the payment of the purchase-money.

Said sale shall be made in the city of Louisville, and notice of the time, place, and terms of sale shall first have been given by public advertisement for at least four months in one or more newspapers published in each of the cities of Louisville, Lexington, Cincinnati and New York. The money arising from any such sale shall be applied, first, to the payment of any interest which may be in arrears upon said bonds and the expenses of executing the trust, including herein a fair and reasonable compensation to the trustee for his services; second, to pay the principal of said bonds, or if there be not sufficient to pay them in full, then to their payment *pro rata.*

30 And on such sale being made it shall and may be lawful for said second party, by the execution of all needful and proper instruments of conveyance, to vest in the purchasers the full and perfect title to the premises, subject only to the lien and power of resale aforementioned.

And said first party does hereby covenant to and with said second party, his successors and assigns, that it will, on reasonable request thereto, make, do, and execute such other and further deeds of conveyance and assurance of the premises, and particularly of the property, rights, and franchises hereafter to be acquired by them, as to the said second party, his successors and assigns, shall seem necessary and proper fully to effectuate the true meaning and effect of this indenture.

And it does further covenant to and with the said second party, his successors, etc., that it will annually, commencing not later than the first day in January, 1883, appropriate from the earnings of said road a sum not less than five thousand dollars, which sum shall be annually expended in the purchase and redemption of said bonds, or in the purchase of other interest-bearing securities approved by said second party, so as to form a sinking fund for the payment of the principal of said bonds when it shall become due.

It is further agreed and understood, that said first party, or its lessee or assigns, shall have the option, at any time after the first of January, 1883, to redeem and take up said bonds, or any of them, by paying par and accrued interest to date of notice of redemption therefor. If election is made so to redeem, notice

31 thereof shall be sufficient if given by advertisement in some daily newspaper published in the city of Louisville for thirty days; and after the expiration of said thirty days the bonds called for and the sums due as interest shall cease to bear interest. But said bonds shall be called for in the order of their numbers, beginning at number one and following in numerical order. In order to the identification of the bonds whose payment it is intended hereby to secure, it is now declared that they shall each be sealed with the corporate seal of said first party, attested by the signature of the president and countersigned by its secretary, and each certified on its face by the second party or his successor to be one of the issue intended to be protected.

And it is further agreed by and between the parties to this indenture, that in the event of the death, resignation, failure, or refusal to act of the said second party, trustee as aforesaid, then it shall and may be lawful for the Shelby circuit court, upon the application of the parties holding said bonds, to the amount of seventy thousand dollars or more, to appoint a trustee or trustees in lieu and stead of said second party; and the trustee or trustees so appointed shall thereupon succeed to and be vested with all rights, powers, and privileges which are by this indenture conferred upon said second party, or intended so to be.

In testimony of all which, the said party of the first part, by its president and board of directors, and in pursuance to action of its stockholders duly had, has caused these presents to be sealed with its corporate seal, and signed with its corporate name, and countersigned by its secretary, this 2nd day of July, 1879.

32 NORTHERN DIVISION OF THE CUMBERLAND & OHIO RAILROAD COMPANY,
By J. C. BECKHAM, *President.*

YODER POIGNARD, *Secretary.*

I accept the trust contained in this mortgage.

JOSHUA F. SPEED.

STATE OF KENTUCKY, }
County of Spencer, } *sct:*

Be it remembered that on this 2nd day of July, 1879, before me, Chas. B. Stilwell, clerk of the county court of Spencer county, personally appeared J. C. Beckham, president of the Northern division of the Cumberland and Ohio Railroad Company, and Yoder Poignard, the secretary of the same company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, the said J. C. Beckham, was the president and he, the said Yoder Poignard, was the secretary of said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company in obedience to action of the stockholders of said company, and that they, the said J. C. Beckham and Yoder Poignard, signed their names thereto by the like order as president and secretary of the said company respectively, and the said J. C. Beckham and Yoder Poignard, who produced to me the foregoing instrument from the said railroad company to Joshua F. Speed, also acknowledged said instrument to be the act and deed of the said Northern division of the Cumberland and Ohio Railroad Company and their own act and deed.

CHAS. B. STILWELL,
Clerk Spencer County Court.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

I, W. E. Loran, clerk of the county court in the county and
33 State aforesaid, hereby certify that Joshua F. Speed, personally known to me as the person whose signature is annexed to the acceptance of the trust created in the foregoing instrument, this day personally appeared before me, in my office, and acknowledged that the foregoing instrument was signed and executed by him, and that the same is his act and deed, all of which is hereby certified to the proper officers for record.

Given under my hand this 16th day of July, 1879.

WM. E. LORAN, *Clerk,*
By GEO. H. WEBB, *D. C.*

STATE OF KENTUCKY, } *sct:*
Shelby County, }

I, John F. Davis, clerk of the county court for the county aforesaid, do certify that the foregoing mortgage from the Northern division of the Cumberland & Ohio Railroad Company, by its president, etc., to Joshua F. Speed, as trustee, etc., was, on the 29th day of July, 1879, produced to me in my office, with two certificates thereon endorsed, and the tax being paid on the 29th day of July, 1879, said mortgage and certificates and this certificate are duly admitted to record in my office.

Given under my hand this 29th day of July, 1879.

JOHN F. DAVIS, *Clerk,*
By THEOPH. STEELE, *D. C.*

STATE OF KENTUCKY, } *sct:*
Henry County, }

I, W. W. Turner, clerk of the county court in the county and State aforesaid, do certify that the foregoing mortgage from
34 the Northern division of the Cumberland and Ohio Railroad Company, by its president, etc., to Joshua F. Speed, trustee, etc., was on this day produced to me in my office for record, whereupon the same, together with the three several foregoing certificates and this certificate, have been duly admitted to record in my office in Mortgage Book No. 1, pages 28–33.

Given under my hand this August 2, 1879.

W. W. TURNER, *Clerk.*

STATE OF KENTUCKY, } *sct:*
Henry County, }

I, W. W. Turner, clerk of the county court within and for the county and State aforesaid, do certify that the foregoing is a true copy of the mortgage from the Cumberland and Ohio railroad to Joshua F. Speed, trustee, &c., as of record in my office.

Witness my hand this November 2, 1885.

W. W. TURNER, *Clerk.*

Copy, $2.50.

"Ex. B."

(Deed Book No. 226, pages 411 to 416, inclusive.)

This indenture of a lease made and entered into by and between the Northern division of the Cumberland and Ohio Railroad Company of the first part and the Louisville, Cincinnati and Lexington Railway Company, of the second part, both railroad corporations duly organized under the laws of the State of Kentucky, witnesseth:

That for and in consideration of one dollar paid cash in hand by the party of the second part and in consideration of the
35 mutual covenants and stipulations hereinafter contained the said party of the first part does hereby lease to the said party of the second part all that part of the first party's unfinished road-bed, rights of way, with improvements and appurtenances, depots and depot grounds, machinery, tools implements together with all its property, rights and franchises including unpaid subscriptions to capital stock, dues and demands belonging to or in anywise appertaining to the said first party's line of railway from its intersection with the second party's railway at the town of Eminence, Ky., thence southwardly through a portion of Henry county, and the counties of Shelby and Spencer and to Bloomfield in the county of Nelson, and State of Kentucky, for the period of thirty years from the date of full execution hereof; upon the terms conditions and stipulations hereinafter set out.

First. Under direction of the stockholders of said first party, its president and directors will execute a mortgage upon all the property, rights and franchises belonging to or in anywise appertaining to said first party's line of road hereinbefore described for the security of three hundred and fifty thousand dollars of mortgage coupon bonds having twenty years to run and bearing interest at the rate of seven per cent. per annum, interest payable on the first days of June and December of each year all of which is fully set out in said mortgage. Now said bonds and coupons are to be fully prepared, signed and countersigned and made ready for use as in the charter of said first party and said mortgage provided and the same will be delivered to said second party within sixty days after the delivery of this lease.

36 Second. Said second party hereby binds and obliges itself that said bonds or proceeds of such as are sold shall be used by it in the construction of said first party's line of railway as provided in this lease and for no other purpose whatever. It is agreed that enough of said bonds may be sold or used in and about contracts for work, labor or material to complete said line of railway at not less than eighty-five cents to the dollar and whatever of said bonds or proceeds after deducting all sums due said second party may not be so used shall after said completion after cancellation of bonds be turned over to said first party and such surplus bonds destroyed.

Third. A fundamental condition of this lease is that if said second party shall not be able to dispose of bonds amounting *to*

their face value to two hundred and fifty thousand dollars the proceeds to be in money, material or labor by or before the first day of September 1880 then this lease terminates and the parties hereto are released and said second party is to restore to said first party all bonds, provided however that no absolute sale of any of said bonds shall be made by said second party unless and until it can place not less than two hundred and fifty thousand dollars in the value thereof in money or its equivalent, and when that quantity of said bonds have been so disposed of by said second party it shall as soon as practicable and not later than the first day of September, 1880, begin the construction of said first party's said line of railway and a failure to begin work within said time shall operate as a termination of this lease. Whenever said two hundred and fifty thousand dollars of said bonds shall have been disposed of as aforesaid
37 this contract becomes absolute and binding on the parties hereto, and the construction of said line of railway from Eminence to Bloomfield shall be commenced and when the construction of said line of railroad is begun the same shall be pushed to completion as rapidly as possible, and a failure on the part of the party of the second part to so complete the same as to allow the safe and regular passage of trains to and from Eminence and Bloomfield within two years from the commencement of work thereon shall at the option of said first party after six months' notice of its election so to do operate as a forfeiture of this lease. None of said bonds shall be sold with past-due coupons annexed thereto, but before selling all past-dues coupons shall be cut off, cancelled and returned by said second party to said first party.

Fourth. When commenced said construction shall be pushed as rapidly as possible with due regard to the greatest economy and the work and superstructure is to be as for a first-class single-track railway with the same guage as the track of said second party's line of railway.

Fifth. It is further agreed that said second party shall furnish all necessary locomotives, engines and rolling stock to operate said line of railway and for the use of same said second party is to receive out of the gross earnings of said first party's line of road the cost of the wear and tear to such engines and rolling stock as may be so furnished. But the first party reserves the right to furnish all, or as much as it can, of said rolling stock and when so furnished said first party shall receive the same compensation therefor as it
38 agreed by said second party on its rolling stock used on said line.

Sixth. It is further agreed and understood that in the operation of said line of railway said second party will make to said first party quarterly returns giving full details of earnings and operating expenses including the expenses of keeping road-bed in order and the net profit arising therefrom shall be applied to the payment of interest and providing for sinking fund and retiring said mortgage bonds. But out of the gross earnings shall be first deducted annually the sum of one thousand dollars which shall be paid to said first party with which to pay the expenses of keeping up its organization

and if the net earnings do not prove sufficient to pay the interest and provide for the sinking fund on said mortgage bonds then second party if all other sources of raising money of said first party proves insufficient, will supply the deficiency so far as it may be done by appropriating the net earnings or so much as may be needed on its own lines which may accrue by reason of business coming to it from, or over said first party's lines.

This pledge and agreement shall be made effectual by mortgage properly executed, acknowledged and recorded and should it become necessary to use any of the net earnings on the lines of the second party to pay said interest and sinking fund or any part of either then all amounts so used, as well as all moneys paid for said first party by said second party, shall be treated as interest-bearing debts, interest at the same rate with said mortgage bonds payable half-yearly and to run from date of such payment, the debt and
39 interest to be repaid out of said net earnings thereafter accruing to said first party on its own lines, which may be so appropriated consistently with the other provisions of this lease and for all sums of money that may become due from said first party to said second party on this or any account a lien is hereby created upon all the property, rights and franchises of said first party owned or to be acquired in favor of said second party to stand next in priority to said mortgage and bonds for three hundred and fifty thousand dollars as aforesaid, but said second party shall not enforce the collection on said debts or any of them by enforcement of said lien until at least eight years have elapsed from and after the creation of the same.

Seventh. It is further agreed and understood that whenever the net earnings from the leased premises shall be sufficient to pay off the interest and sinking fund on said mortgage bonds for three hundred and fifty thousand dollars, or such portion thereof as is outstanding, and to repay said second party all dues and demands then due or owing, the surplus net earnings, unless used in retiring said bonds as provided in said mortgage, less one-tenth thereof shall be paid over to said first party. The one-tenth of said net earnings to be retained by second party for its own use.

Eighth. It is further agreed and understood that so long as said second party may operate said lease- lines of railway no greater rates of charges either for freight or passage thereon, shall be demanded or received than is demanded or received under its regular tariff on its own lines of railway for local freight and passage.
40 Ninth. It is further agreed and understood that said first party assigns, transfers and sets over to said second party all claims, dues and demands choses in action, unpaid subscriptions to capital stock (except private subscriptions and all evidences thereof) of every kind and character to be by said second party collected by suit or otherwise, with power to settle, compromise, arbitrate or adjudge as to it may seem best. But this agreement and transfer does not become absolute (except as to so much thereof as may be necessary to refund and indemnify to said second party the cost of printing and issuing said mortgage bonds or incidental thereto which is absolute) until said second party give notice in writing to

the president of said first party that said two hundred and fifty thousand dollars of said mortgage bonds have been disposed of as hereinbefore provided, and then and after such notice said second party may at once proceed as provided, under this clause of this lease.

Tenth. It is further agreed and understood that this lease is not assignable without the consent of the grantor, that during the existence of said lease the second party will pay all taxes, lawfully assessed against said leased premises, the amount thereof to be charged to operating expenses, and at the termination thereof said leased premises shall be restored to said first party in good repair unless the same be extended or renewed by mutual consent, or unless prevented by unavoidable casualty, legal proceedings, or operations at law.

Eleventh. The second party hereby agrees to furnish any means necessary to complete said first party's line of road from
41 Eminence to Bloomfield which may not be derived from the sale of the bonds to be issued by said first party, and also to furnish any means necessary to any interest which may become due on the said mortgaged bonds previous to the completion of said first party's line of road which may not be derived from the earnings of said line of road; any means so furnished by said second party is to become a lien debt due to said second party by the said first party and payable upon the same terms and conditions as heretofore provided as to the other indebtedness.

Twelfth. If said second party be hindered or delayed in beginning or completing said line of railway by act or omission of said first party, or by legal or equitable proceedings, then the period or periods of such delay shall not be computed as part of the time within which said second party is to do or perform any acts or things under this contract.

In testimony whereof, the said first party, acting under authority and approval of the stockholders, duly had in stockholders' meeting assembled on the 24th day of June, 1879, has caused these presents to be signed in duplicate in its corporate name by its president and countersigned by its secretary, and its corporate seal hereto affixed, and the said second party acting under authority and approval of its stockholders duly had in stockholders' meeting assembled on the 28th day of July, 1879, has caused these presents to be signed in duplicate in its corporate name by its president and countersigned by its secretary, and its corporate seal hereto affixed, this 28th day of July, 1879.

[SEAL.] THE NORTHERN DIVISION OF THE CUMBERLAND AND OHIO RAILROAD COMPANY,
By J. C. BECKHAM, *President.*
YODER POIGNARD, *Sec'y.*

[SEAL.] LOUISVILLE, CINCINNATI AND LEX-
42 INGTON RAILWAY COMPANY,
By J. B. WILDER, *President.*

Attest: S. S. EASTWOOD, *Sec'y.*

STATE OF KENTUCKY, } ss:
County of Spencer, }

Be it remembered that on this 24th day of June, 1879, before me, Chas. B. Stilwell, the clerk of the county court of Spencer county, personally appeared J. C. Beckham, the president of the Northern division of the Cumberland and Ohio Railroad Company, and Yoder Poignard, the secretary of the same company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, the said J. C. Beckham, was the president and he, the said Yoder Poignard, was the secretary of said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company in obedience to the action of the stockholders of said company, and that they, the said J. C. Beckham and Yoder Poignard, signed their names thereto by like order as president and secretary of said company respectively, and the said J. C. Beckham and Yoder Poignard, who produced to me the foregoing instrument from the said railroad company to the Louisville, Cincinnati and Lexington Railway Company, also acknowledged the said instrument to be the act and deed of the said
43 Northern division of the Cumberland and Ohio Railroad Company and their own act and deed.

Given under my hand this day and date first above written.

CHAS. B. STILWELL,
Clerk Spencer County Court.

STATE OF KENTUCKY, } ss:
Jefferson County, }

Be it remembered that on the 30th day of July, 1879, before me, W. E. Loran, clerk of the county court of Jefferson county aforesaid, personally appeared J. B. Wilder, the president of the Louisville, Cincinnati and Lexington Railroad Company, and S. S. Eastwood, the secretary of the same company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that the said J. B. Wilder was the president and he, the said S. S. Eastwood, was the secretary of said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company in obedience to the action of the stockholders of said company, and that they, the said J. B. Wilder and S. S. Eastwood, signed their names thereto by the like order as president and secretary of said company respectively, and the said J. B. Wilder and S. S. Eastwood, who produced to me the foregoing instrument from the said railroad company to the Louisville, Cincinnati and Lexington Railroad Company, also acknowledged the said instrument to be the act and deed of the said Louisville, Cincinnati and Lexington Railroad Company and their act and deed, and I have recorded it this, and the foregoing certificate, in my said office.

44 Witness my hand and official seal the day and date above written.

[SEAL.] WM. E. LORAN, *Clerk.*

Deed Book No. 226, page 418.

I hereby certify that the foregoing lease and certificates are truly and completely copied from the records now on file in my office, as clerk of Jefferson county court.

Witness my hand this 14th day of October, 1885.

GEO. H. WEBB,
Cl'k Jeff. Co. Ct., Ky.

"Ex. C."

This indenture of mortgage made and entered into by and between the Louisville, Cincinnati and Lexington Railway Company, a railway corporation under the laws of the State of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part:

Witnesseth: That whereas by authority of an act of the General Assembly of the Commonwealth of Kentucky approved the 18th day of March, 1878, the party of the first part has entered into a contract with the Northern division of the Cumberland and Ohio Railroad Company for the lease, construction and operation of the latter company's lines of road from Eminence in Henry county, Ky., through a part of said county, and the counties of Shelby and Spencer, and into Nelson county, so far as Bloomfield—all in the State of Kentucky. Said lease to continue for thirty years

45 upon the terms therein set out in which it is stipulated by and on behalf of said first parties herein that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of three hundred and fifty bonds of one thousand dollars each, bearing interest at the rate of seven per cent. per annum payable half yearly on the first days of June and December and having twenty years to run from the 2d day of July 1879 to be issued by said Northern division of the Cumberland and Ohio Railroad Company and if all the sources of raising money of said Northern division of the Cumberland and Ohio Railroad Company fail to provide for said interest and sinking fund then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed on its own lines, which may accrue to it by reason of business coming to it from or over the said lines of the said Northern division of the Cumberland and Ohio Railroad Company, and whereas said contract of lease has been fully consumt mated by action of the stockholders of the first party herein and it is now desired to carry into effect the said stipulation as to said neearnings,

Now, in consideration of one dollar cash in hand paid by said second party to said first party, and the premises the said first party has this day and does hereby mortgage and put in lien all net

earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern division of the Cumberland and Ohio Railroad Company to the said Joshua F. Speed, as trustee aforesaid (who is the trustee for the mortgage made by said
46 Northern division of the Cumberland and Ohio Railroad Company to secure said three hundred and fifty bonds of one thousand dollars each): Conditioned, that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party if all other sources of raising money of said Northern division of the Cumberland and Ohio Railroad Company prove insufficient will supply the deficiency so far as it may be done by appropriating and paying over promptly the net earnings, or so much thereof as may be needed, on its own lines, which may accrue by reason of business coming to it from or over said Northern division of the Cumberland and Ohio Railroad Company's lines for the purpose of discharging said interest and sinking fund as they severally fall due.

In testimony whereof the said first party acting under the authority and approval of its stockholders duly assembled in stockholders' meeting on the 28th day of July, 1879, has caused these presents to be signed in duplicate in its corporate name by its president and countersigned by the secretary, and its corporate seal hereto affixed this 28th day of July, 1879.

THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY,

[SEAL.] By J. B. WILDER, *President.*

Attest: S. S. EASTWOOD, *Secretary.*
JOSHUA F. SPEED, *Trustee.*

STATE OF KENTUCKY, }
County of Jefferson, } *ss:*

47 Be it remembered that on the 30th day of July, 1879, before me, Wm. E. Loran, the clerk of the county court of Jefferson county, personally appeared J. B. Wilder, the president of the Louisville, Cincinnati and Lexington Railroad Company, and S. S. Eastwood, the secretary of the said company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, the said J. B. Wilder, was the president and he, the said S. S. Eastwood, was the secretary of said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company, in obedience to the action of the stockholders of said company, and that they, the said J. B. Wilder and S. S. Eastwood, signed their names thereto by the like order as president and secretary of the said company respectively, and the said J. B. Wilder and S. S. Eastwood, who produced to me the foregoing instrument from said railway company to Joshua F. Speed, also acknowledged the said instrument to be the act and deed of said Louisville, Cin-

cinnati and Lexington Railway Company and their own act and deed, as also appeared the said Joshua F. Speed, who acknowledged the same to be his act and deed.

All of which is hereby certified for record to the clerk of the Oldham county court, to the clerk of the Henry county court, to the clerk of the Shelby county court, to the clerk of the Franklin county court, to the clerk of the Woodford county court, to the clerk of the Scott county court, to the clerk of the Fayette county court, to the clerk of the Carroll county court, to the clerk of the Gallatin
48 county court, to the clerk of the Grant county court, to the clerk of the Boone county court, to the clerk of the Kenton county court, to the clerk of the Campbell county court, which is hereby done, and that I have recorded this mortgage and this certificate in my said office.

In witness whereof I have hereunto set my hand and affixed my official seal this 30th day of July, A. D. 1879.

[SEAL.] WM. E. LORAN, *Cl'k.*

P. 421, D. B. 226.

I, Geo. H. Webb, clerk of the Jefferson county court, Kentucky, do certify that the foregoing mortgage and certificates are truly and completely copied from the records now on file in my office as clerk aforesaid.

Witness my hand this 14th day of October, 1885.

GEO. H. WEBB,
Cl'k Jeff. Co. Ct., Ky.

"Ex. D."

Contract between Northern division of Cumberland and Ohio Railroad Co., of the first part, and the Louisville, Cincinnati & Lexington Railway Company, of the second part, and Joshua F. Speed, trustee, of the third part, modifying and altering original mortgage, acknowledged before Wm. E. Loran, Co. "clerk," 23d Jan'y, 1880.

This contract, made and entered into by and between the Northern division of the Cumberland and Ohio Railroad Company,
49 of the first part, and the Louisville, Cincinnati & Lexington Railway Company, party of the second part (both railway corporations duly incorporated under the laws of the State of Kentucky), and Joshua F. Speed, trustee, party of the third part,

Witnesseth: That for and on account of the difficulties of carrying into effect the contract of the parties of the first and second parts hereto, in relation to the lease, construction, and operation of said first party's proposed line of railway from Eminence to Bloomfield, of date the 28th day of July, 1879, said parties have and do hereby agree upon the following changes and modifications of said contract and the mortgage therein named, to take effect when and as soon as this change and modification shall have been duly and properly approved by a majority of the stockholders of each of said companies, and fully executed and recorded in the proper offices, when

to all intents and purposes the said contract so amended and modified shall be regarded and taken as the true contract and agreement between the parties hereto.

First. Whenever said second party shall be able to dispose of said mortgage bonds provided for in said contract and mortgage amounting at their face value to the sum of $150,000 (one hundred and fifty thousand dollars), said bonds, numbered from 1 to 150 inclusive, the proceeds in money, labor, or materials, the same may be done, and then this contract as amended and in all its particulars becomes absolute, and the construction of that portion of said first party's line of railway between Shelbyville and Bloomfield shall be commenced and pushed to completion as rapidly as possible; and a failure to complete said road so as to permit
50 the safe and regular passage of trains between Shelbyville and Bloomfield within two years from the commencement of work thereon shall, at the option of said first party after six months' notice, operate as a forfeiture of said lease; but no disposition of any of said bonds shall be made until not less in amount than $150,000 (one hundred and fifty thousand dollars) of the face value thereof, numbered as aforesaid, can be placed for money or its equivalent.

Second. Not more than $250,000 (two hundred and fifty thousand dollars) of the face value of said bonds, numbered from 1 to 250 inclusive, shall be used or disposed of in and about the construction of said railroad between Shelbyville and Bloomfield, and $100,000 (one hundred thousand dollars) of the face value of said bonds, numbered from 251 to 350 (both inclusive), shall be set apart and faithfully preserved in such manner as the boards of directors of the first and second parties may agree, for the ultimate construction of said first party's road between Eminence and Shelbyville; but said second party shall not be bound to begin the construction or operation of said last-named portion of said railroad until, in the judgment of the board of directors of the said second party, the operation of the same would result in sufficient earnings to pay operating expenses and interest and sinking fund on the amount required to complete the same; and the mortgage heretofore made to Joshua F. Speed, trustee therein, is hereby so modified that the said two hundred and fifty bonds to be used in constructing said railroad between Shelbyville and Bloomfield shall constitute no lien on that part of said company's road between Eminence and Shelbyville until said one hundred bonds set apart
51 for its construction shall have been used for that purpose, and then all of said bonds issued shall be a joint and equal lien on the whole property as set out in the original mortgage; and the said Speed as trustee is made a third party hereto and shall sign this contract as evidence of his consent to the modification in this respect of the said mortgage, it being agreed and understood that at this date none of said mortgage bonds have been sold or disposed of, but remain in the hands of the said second party, provided that unless the second party shall complete the construction of so much of said first party's road as lies between Shelbyville and Eminence within five years from the first of September, 1880, then

the lease of said last-named part of said road shall determine and terminate at the option of said first party after six months' notice, and in the event of such termination of the lease said bonds, numbered from 251 to 350 both inclusive, as aforesaid, and the coupons thereof shall at once be cancelled so as to prevent their circulation, or if the boards of the parties aforesaid so order it they shall be destroyed.

Third. Before any of said bonds, numbered from 1 to 250, both inclusive, shall be sold or disposed of each shall have a printed or lithographed indorsement thereon to the effect that none of them or their coupons have any lien upon the company's property, or franchise, or line of road north of Shelbyville until the one hundred bonds aforesaid are issued or used, and that portion of said road between Shelbyville and Eminence shall have been completed, and then all of said bonds and coupons shall have a common and joint lien on the whole property.

52 Fourth. The boards of directors of the first and second parties may agree to the use of second-hand rails in building said road or any part of it, said rails to be sufficient for the safe transmission of trains and to be removed and replaced as fast as they become unsafe. The price of said second-hand rails to be agreed upon by said boards before being used.

Fifth. In all respects in which this contract is inconsistent with the original contract or mortgage, said originals are abrogated and the contract as modified and amended by this agreement shall be taken as the true existing contract between the parties.

In testimony whereof, the said first and second parties, acting under directions of their respective stockholders, have each caused this contract to be signed with their corporate names and seals annexed by their respective presidents, and countersigned by the secretaries, and also duly signed by the said Joshua F. Speed.

[SEAL.] THE NORTHERN DIVISION OF THE CUMBERLAND AND OHIO RAILROAD COMPANY,
By J. C. BECKHAM, *President.*

Attest: YODER POIGNARD, *Secretary.*

[SEAL.] THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY,
By J. B. WILDER, *President.*

Attest: S. S. EASTWOOD, *Secretary.*

JOSHUA F. SPEED.

I, Wm. E. Loran, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing deed was produced to me, in my office, and acknowledged

53 and delivered by Joshua F. Speed, a party thereto, to be his act and deed.

Witness my hand this 23d day of January, 1880.

W. E. LORAN, *Clerk.*

I, Wm. E. Loran, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing deed was further acknowledged and delivered before me in my office by J. C. Beckham, as president, to be the act and deed of the Northern division of the Cumberland & Ohio Railroad Company, and by J. B. Wilder, as president, to be the act and deed of the Louisville, Cincinnati & Lexington Railway Company, parties thereto, and the seal of the Louisville, Cincinnati & Lexington Railway Company thereto attached was acknowledged and proved to be the seal of said corporation by the oath of S. S. Eastwood, secretary.

Witness my hand this 24th day of January, 1880.

W. E. LORAN, *Clerk.*

I, Wm. E. Loran, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing deed was further and fully acknowledged and delivered before me in my office by Yoder Poignard, secretary, a party thereto, to be his act and deed.

Witness my hand this 30th day of January, 1880.

W. E. LORAN, *Clerk.*

I, Wm. E. Loran, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing deed was again produced to me in my office, and that I have recorded it, this, and the foregoing certificate in my said office.

54 Witness my hand and official seal this 10th day of February, 1880.

[SEAL.] W. E. LORAN, *Clerk.*

STATE OF KENTUCKY, }
Jefferson County. }

I, Geo. H. Webb, clerk of the county court within and for the county and State aforesaid, do certify that the foregoing one and a half pages contain a true and correct copy of the contract between the Northern division of the Cumberland & Ohio Railroad Co., &c., to Joshua F. Speed, trustee, as recorded in Deed Book 230, p. 532, in my office.

Witness my hand this 6th day of Nov., 1885.

GEO. H. WEBB,
Cl'k Jeff. Co. Ct., Ky.

And at a court held for the court aforesaid on the 16th day of November, 1885—

Came plaintiff-, by counsel, and filed an affidavit herein.

The said affidavit is in words and figures as follows, to wit:

Louisville Law and Equity Court.

ADOLPH L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY, &c., Defendants. } Affidavit.

Adolph L. Schmidt says he is plaintiff in the petition filed
55 in the above-styled action, and that the statements of said petition are true as he believes.

ADOLPH L. SCHMIDT.

Subscribed and sworn to before me by Adolph L. Schmidt this 9th day of November, 1885.

TEMPLE BODLEY,
Notary Public for Jefferson County, Ky.

On the 7th day of December, 1885, came the plaintiffs, by counsel, and filed in the office of the clerk of the aforesaid court an amended petition herein in words and figures as follows, to wit:

A. L. SCHMIDT, Trustee, —, Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEX. R'WAY CO., &c., Defendants. } Amended Petition.

Plaintiffs amend their petition herein by striking out the word "exclusive," in the sentence, upon the 17th page thereof, commencing as follows, to wit, "Plaintiffs say they are ignorant of the exact amount of the net earnings of said Northern division," &c., and by striking out the words, to wit, "a great number or," in the last part of and upon the next to the last line of said sentence.

TEMPLE BODLEY, *For Pl'ffs.*

And at a court held for the court aforesaid on the 14th day of December, 1885—

This action having been set at rules on the *on the* — inst. by plaintiff- and now coming on to be heard, it is ordered that the
56 same be and is postponed until the 21st inst.

And at a court held for the court aforesaid on the 21st day of December, 1885—

Ordered that this action be and is postponed until the 4th day of January, 1886, for hearing.

And at a court held for the court aforesaid on the 2nd day of January, 1886—

On motion of plaintiff, by counsel, it is ordered that the amended petition filed in the clerk's office December 7th, 1885, is now noted of record as if filed in court.

And at a court held for the court aforesaid on the 4th day of January, 1886—

Ordered that this action be and is postponed until the 11th inst. for hearing.

And at a court held for the court aforesaid on the 11th day of January, 1886—

Ordered that this action be and is postponed until the 25th inst. for hearing.

On the 22nd day of January, 1886, came the plaintiffs, by counsel, and filed in the office of the clerk of said court their amended petition herein in words and figures as follows, to wit:

Louisville Law and Equity Court.

57 ADOLPH L. SCHMIDT, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI & LEXINGTON RAILway Company and J. B. Wilder, Defendants. } Amended Petition.

Plaintiff-, by way of amendment to their petition herein, say that the defendant J. B. Wilder claims to be the owner and holder of some of the mortgage bonds mentioned in the original petition herein and refuses to concur or join with the plaintiffs herein, and that said Wilder is therefore made a party defendant to this action.

TEMPLE BODLEY, *p. q.*

Upon the filing of the foregoing amended petition there issued thereon a summons and copy from the office of the clerk of said court in words and figures as follows, to wit:

To the marshal of the Louisville chancery court, Greeting:

We command you to summon J. B. Wilder to answer an amended petition exhibited against him in our Louisville law and equity court by Adolph L. Schmidt, &c., 1860, and warn him that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days, if elsewhere in the State, judgement may be rendered by default or answer compelled or proof taken, at petitioner's option; and make due return hereof within sixty days from the date hereof.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, at the court-house, in the city of Louisville, this 22nd day of January, 1886.

58 JNO. H. WELLER, *Clerk*,
By ALEX. A. LUCAS, *D. C.*

Executed on J. B. Wilder, Jan. 22nd, 1886, by delivering to him a copy of this summons.

W. H. BAILEY, *M. L. C. C.*,
By W. E. MONTZ, *D. M.*

And at a court held for the court aforesaid on the 25th day of January, 1886—

On motion of plaintiff-, by counsel, the amended petition filed in clerk's office January 22nd, 1886, is now noted of record as filed in court.

Came the defendant The Louisville, Cincinnati and Lexington Railway Company, by Barnett, counsel, and filed its answer herein.

Ordered that this action be and is postponed until the 8th day of February, 1886, for hearing.

The said answer is in words and figures as follows, to wit:

Louisville Law and Equity Court.

A. SCHMIDT ET AL., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, Defendant. } Answer.

For answer to the petition the defendant The Louisville, Cincinnati & Lexington Railway Company says it denies that the plaintiffs or any of them have demanded of it or the Northern division of the Cumberland and Ohio R. R. Co. the interest on
59 their bonds.

It denies that it has received any net earnings from operating said Northern division of the Cumberland and Ohio R. R. Co. nor has it received large or any such earnings on its own lines, which accrued to it by reason of business coming to it from and over said Northern division of the C. & O. R. R. Co.'s lines, of which it agreed to make returns, or at all, or to any one.

It denies that it has exclusive knowledge of the said net earnings of said Northern division of the C. & O. R. R. Co. or of the alleged net earnings which accrued to it by reason of business coming to it from over the lines of said Northern division of the C. & O. R. R. Co., nor has it exclusive knowledge or evidence of such earnings.

Nor has there been any such net earnings or a sufficiency thereof to pay any or all of said overdue coupons.

It denies that all the holders of said mortgage bonds have a common interest with plaintiffs, nor has it knowledge or information sufficient to form a belief that plaintiffs or any of them hold the number of mortgage bonds claimed.

S. S. Eastwood says he is secretary of the defendant The Louisville, Cincinnati & Lexington Railway Company and that the president is absent from the State of Kentucky, and he believes the statements contained in the foregoing rejoinder are true.

S. S. EASTWOOD.

Sworn to before me by S. S. Eastwood this 25th day of January, 1886.

A. M. QUARRIER,
N. P., J. C., Ky.

60 And at a court held for the court aforesaid on the 4th day of February, 1886—

Came plaintiff-, by counsel, and filed a notice herein and moved the court to refer this action to the commissioner of this court; to which defendant objects.

Came defendant Louisville, Cincinnati & Lexington Railway

Company, by counsel, and filed a demurrer to plaintiffs' petition herein, and also moved the court for a rule against plaintiffs to show cause, if any *he* has or can, why *he* shall not be compelled to file the bonds and coupons *dued* on; to which plaintiff objects.

And this action is assigned to the 5th inst., at 9.30 o'clock a. m., for hearing on pending motions and on demurrer.

The said notice so filed is in words and figures as follows, to wit:

A. L. SCHMIDT, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY Company, &c., Defendants. } Notice.

Defendants, L., C. C. & L. R'way Co., &c., are hereby notified that the undersigned will on 4th day of February, 1886, at or about the hour of ten o'clock a. m., at the court-house, in Louisville, law and equity court, move the court for an order referring the above-styled cause to the commissioner.

SIMRALL & BODLEY,
Att'ys for Plaintiffs.

Executed on me 3rd inst., 1½ o'clock p. m.

A. BARNETT,
Att'y for Def't.

61 And the said demurrer is in words and figures as follows, to wit:

A. L. SCHMIDT ET AL., Plaintiffs,
against
L., C. & L. R'w'y Co., &c., Defendants.

The defendant The Louisville, C. & L. R'w'y Co. demurs to the pl'ffs' petition herein, and says the same does not state facts sufficient to constitute a cause of action, and of this it prays judgment.

BARNETT, NOBLE AND BARNETT.

And at a court held for the court aforesaid on the 5th day of February, 1885—

On motion of defendant, by counsel, the plaintiffs are ordered to make the Northern division of the Cumberland & Ohio railroad a party to this action.

This action, coming on to be heard on defendant's demurrer to the petition, was heard and submitted, and the court being advised, it is considered and ordered that said demurrer be, and the same is now, overruled; to which defendant excepts.

On motion of plaintiffs, by counsel, leave is given them to amend their petition herein by interlineation.

This action, having been heard on plaintiffs' motion to refer to the commissioner, was submitted, and the court being advised, it is considered and ordered that said motion be, and the same is now, sustained; to which defendant excepts.

And it is therefore now ordered that this action be and is referred to the commissioner of this court, with directions to
62 take proof and report to the court all the net earnings of the Louisville, Cincinnati & Lexington Railway Company from the 1st day of December, 1882, until the date of the report, on its own lines, which accrued to it by reason of business coming to it from or over the lines of the Northern division of the Cumberland and Ohio Railroad Company, and for this purpose it is ordered that the defendant produce to the commissioner the quarterly returns of the earnings of the defendant during that time over its lines, as well as over the lines of said Northern division of the Cumberland and Ohio Railroad Company from such business, and also produce to the commissioner all the books, reports, vouchers, waybills, and other papers relating to said business and earnings during that time. The commissioner is also directed to report who are the holders and owners of the mortgage bonds referred to in the petition; to all of which defendant excepts.

And at a court held for the court aforesaid on the 6th day of February, 1886—

Came plaintiffs, by counsel, and filed an amended petition herein.

Came plaintiff-, by counsel, and produced in court one hundred and thirty-three of the thousand-dollar bonds mentioned in the petition herein (each bearing 32 coupons attached), which are held and owned by said plaintiffs as follows: 31 of them by Adolph L. Schmidt individually, 5 by Jacob Peter, 8 by James McCarty, 2 by George H. Breed, 5 by Jane M. Reed, 21 by P. Booker Reed, 5 by Eliza S. Reed, 22 by Leander S. Reed, 6 by W. C. Reamer, and 28 by Jacob Krieger, Sr.; and, on motion, said plaintiffs are
63 allowed to withdraw from court their said bonds for safe keeping without leaving copies, which is done.

The said amended petition is in words and figures as follows, to wit:

Louisville Law and Equity Court.

ADOLPH L. SCHMIDT, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON Railway Company, The Northern Division of the Cumberland and Ohio Railroad Company, &c., Defendants. } Amended Petition.

Plaintiffs, by way of amendment to their petition herein, say that the Northern division of the Cumberland and Ohio Railroad Company is a corporation duly incorporated and organized under the laws of the State of Kentucky, and as such is capable of contracting and being contracting with, of acquiring and holding property, and of suing and being sued in all the courts of the Commonwealth; that said Northern division of the Cumberland and Ohio Railroad Company claims to have some interest in this action, and is therefore made a defendant herein.

Wherefore plaintiffs pray, &c.

SIMRALL & BODLEY, *Att'ys.*

Upon the filing of the foregoing amended petition there issued thereon from the office of the clerk of said court a summons and copy directed to the sheriff of Shelby county in words and figures following, to wit:

64 To the marshal of the Louisville chancery court, Greeting:

We command you to summon Northern division of the Cumberland & Ohio Railroad Company to answer an amended petition exhibited against *is* in our Louisville law and equity court by Adolph L. Schmidt, #1860, and warn it that upon failing so to do for twenty days, if in Jefferson county, or for thirty days, if elsewhere in the State, judgment may be rendered by default or answer compelled or proof taken at petitioner's option; and make due return hereof within sixty days from the date hereof.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, at the court-house, in the city of Louisville, this 6th day of February, 1886.

JOHN H. WELLER, *Clerk*,
By ALEX. A. LUCAS, *D. C.*

Executed by delivering a true copy of this summons to J. C. Beckham, president of the Northern division of the Cumberland and Ohio Railroad Company (without the hope of fee or reward), February 9th, 1886.

H. G. CARDWELL,
Sheriff Shelby County, Ky.

And at a court held for the court aforesaid on the 8th day of February, 1886—

Came plaintiff-, by counsel, and filed an amended petition herein; and it is ordered that this action be and is now remanded.

Came the defendant The Louisville, Cincinnati & Lexing-
65 ton Railway Company, by counsel, and moved the court to set aside the order of reference herein; to which plaintiff objects, and said motion, coming on to be heard, was submitted, and the court, not being advised, takes time.

The said amended petition is in words and figures as follows, to wit:

Louisville Law and Equity Court.

ADOLPH L. SCHMIDT, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI & LEXINGTON Railway Company, &c., Defendants. } Amended Petition.

Plaintiffs, by leave of court, amend their petition herein and say that the plaintiff James McCarty became the purchaser and is now the owner and holder of 8, eight, of the thousand-dollar bonds mentioned in said original petition, instead of three (3) of said bonds, as stated therein.

SIMRALL & BODLEY, *Att'ys, p. q.*

And at a court held for the court aforesaid on the 23rd day of February, 1886—

The court being now advised, it is considered and ordered that the motion to set aside the order of reference herein be, and the same is, overruled; to which defendant The Louisville, Cincinnati & Lexington Railway Company excepts.

And at a court held for the court aforesaid on the 22nd day of March, 1886—

66 On motion of plaintiffs, by counsel, a rule is awarded them against the defendant The Louisville, Cincinnati and Lexington Railway Company, returnable the 29th inst., to show cause, if any it has or can, why it shall not be compelled to produce to the commissioner the quarterly returns beginning December 1st, 1882, of earnings of said defendant over the lines of the Northern division of the Cumberland and Ohio Railroad Company, as well as earnings on its own lines, which may accrue by reason of business coming to it from or over the lines of the said Northern division of the Cumberland and Ohio Railroad Company, and also to produce to the commissioner all the books, reports and vouchers, waybills, and other papers relating to said business since said December 1st, 1882.

And thereupon, on the same day, to wit, the 22nd day of March, 1886, there issued from the office of the clerk of said court a rule, in accordance with the order therefor, directed to the marshal of said court, who made his return thereon in words and figures as follows, to wit:

Executed on Louisville, Cincinnati & Lexington Railway Company Mar. 27th, 1886, by delivering a copy of this rule to M. H. Smith, president thereof.

W. H. BAILEY, *M. L. C. C.*,
By W. E. MONTZ, *D. M.*

And at a court held for the court aforesaid on the 29th day of March, 1886—

Came defendant, by counsel, and filed an exhibit herein
67 marked "Quarterly earnings."

On motion of plaintiff-, by counsel, the rule herein is respited until April 5th, 1886.

Came defendant J. B. Wilder, by counsel, and filed his answer herein.

The said exhibit marked "Quarterly earnings" is in words and figures as follows, to wit:

68 Exhibit marked "A 1" is in words and figures as follows, to wit:

Statement showing net earnings accruing to L., C. & L. R'w'y on business coming from or over the Northern division of the Cumberland and Ohio R. R. and the loss in operating the Northern division of the Cumberland and Ohio R. R., exclusive of earnings accruing to L., C. & L. R'w'y from December 1st, 1882, to September 30th, 1885.

Year.	Month.	Earnings accruing to L., C. & L. R'w'y business from Northern div. of C. & O. R. R.				Loss in operating Northern division of the C. & O. R. R.		
		Earnings.	Percentage of operating expenses to earnings.	Expenses.	Net earnings.	Earnings.	Operating expenses.	Loss.
1882...	December..	1,292 79	103.64	1,339 85	*47 06	3,052 74	2,818 85	†233 89
1883...	January.....	523 65	97.57	510 92	12 73	2,281 18	2,899 77	618 59
" ...	February...	739 84	111 09	821 89	*82 05	2,226 55	2,985 98	759 43
	Total.....	2,556 28	.....	2,672 66	*116 38	7,560 47	8,704 60	1,144 13
1883...	March.....	583 19	93 38	544 58	38 61	2,034 08	2,702 54	668 46
" ...	April.....	438 49	100.28	439 72	*1 23	1,551 01	3,518 30	1,967 29
" ...	May.....	781 35	83.68	653 83	127 52	2,120 64	2,828 67	708 03
	Total.....	1,803 03	.....	1,638 13	164 90	5,705 73	9,049 51	3,343 78
1883...	June.....	1,410 32	96 43	1,359 97	50 35	1,976 62	5,271 96	3,295 34
" ...	July	1,330 12	80.11	1,065 56	264 56	2,157 37	3,078 67	921 30
" ...	August.....	1,633 17	70.24	1,147 14	486 03	3,673 37	3,310 65	362 72
69	Total.....	4,373 61	.....	3,572 67	800 94	7,807 36	11,661 28	3,853 92
1883...	September.	1,258 53	64.97	817 67	440 86	2,821 37	3,097 21	275 84
" ...	October.....	1,249 04	66.85	834 98	414 06	2,506 51	3,381 66	875 15
" ...	November..	978 39	86.06	842 00	136 39	2,356 13	3,449 59	1,093 46
	Total.....	3,485 96	.....	2,494 65	991 31	7,684 01	9,928 46	2,244 45
1883...	December..	588 25	108.55	638 55	*50 30	1,958 52	3,034 74	1,076 22
1884...	January.....	496 60	101.66	504 84	*8 24	1,512 33	2,549 85	1,037 52
" ...	February....	507 62	112.27	569 90	*62 28	1,388 51	3,155 15	1,766 64
	Total.....	1,592 47	.....	1,713 29	*120 82	4,859 36	8,739 74	3,880 38
1884...	March	662 39	81.51	539 91	122 48	2,011 40	2,949 11	937 71
" ...	April.....	487 28	84.12	409 90	77 38	1,714 73	2,894 01	1,179 28
" ...	May.....	1,081 68	73.78	798 06	283 62	2 260 90	2,932 75	671 85
	Total.....	2,231 35	.....	1,747 87	483 48	5,987 03	8,775 87	2,788 84
1884...	June.....	1,032 63	83.77	865 03	167 60	1,805 94	3,199 38	1,393 44
" ...	July.....	1,421 53	73.28	1,041 70	379 83	2,579 86	2,724 05	144 19
" ...	August.....	1,384 74	69 89	967 79	416 95	3,163 01	3,749 84	586 83
	Total.....	3,838 90	.....	2,874 52	964 38	7,548 81	9,673 27	2,124 46
1884...	September.	809 46	77.68	628 79	180 67	2,506 67	3,411 10	904 43
...	October	959 62	75 55	724 99	234 63	2,508 81	3,401 08	892 27
...	November..	784 80	86.99	682 70	102 10	2,186 22	2,753 29	567 07
	Total.....	2,553 88	.....	2,036 48	517 40	7,201 70	9,565 47	2,363 77
1884...	December..	1,146 08	84 51	968 55	177 53	2,542 28	2,646 37	104 09
1885...	January.....	522 62	87.65	458 07	64 55	1,679 06	2,308 32	629 26
...	February ...	378 34	88.98	336 65	41 69	1,486 21	2,289 09	802 88
	Total.....	2,047 04	.....	1,763 27	283 77	5,707 55	7,243 78	1,536 23
1885...	March.....	294 83	74.07	218 38	76 45	1,719 31	2,409 39	690 08
" ...	April.....	318 91	79.30	252 90	66 01	1,476 63	2,939 03	1,462 40
" ...	May	467 00	84.39	394 10	72 90	1,798 91	2,710 43	911 52
70	Total.....	1,080 74	.....	865 38	215 36	4,994 85	8,058 85	3,064 00

Statement Showing Net Earnings Accruing, etc.—Continued.

Year.	Month.	Earnings accruing to L., C. & L. R'w'y business from Northern div. of C. & O. R. R.				Loss in operating Northern division of the C. & O. R. R.		
		Earnings.	Percentage of operating expenses to earnings.	Expenses.	Net earnings.	Earnings.	Operating expenses.	Loss.
1885...	June	1,295 23	84 39	1,017 09	188 14	1,681 80	3,473 04	1,791 24
	July.....	1,311 73	85.40	1,120 22	191 51	1,976 42	2,698 12	721 70
	August.....	670 68	76.55	513 40	157 28	2,594 78	3,022 22	427 44
	Total.....	3,187 64	.....	2,650 71	536 93	6,253 00	9,193 38	2,940 38
1885...	September.	822 88	71.15	585 48	237 40	2,136 96	3,393 36	1,256 40
	Grand total.	29,573 78	.....	24,615 11	4,958 67	73,446 83	103,987 57	30,540 74

* Loss.
† Gain.

Louisville, Ky., March 9, 1886.

R. E. SEWELL,
Auditor of Disb'ts.

71 The exhibit marked "A 2" is in words and figures as follows, to wit:

Statement showing net earnings accruing to L., C. & L. R'w'y on business coming from or over the Northern division of the Cumberland & Ohio railroad and the loss in operating the Northern division of the Cumberland and Ohio railroad, exclusive of earnings accruing to L., C. & L. R'w'y from October 1, 1885, to October 31st, 1887.

Year.	Months.	Earnings accruing to L., C. & L. R'w'y on business from Nor. div. of C. & O. R. R.				Loss in operating Nor. div. of C. & O. R. R.		
		Earnings.	Percentage of operating expenses to earnings.	Expenses.	Net earnings.	Earnings.	Operating expenses.	Loss.
1885...	October.....	575 62	78.14	449 79	125 83	1,924 24	2,658 83	734 59
" ...	November..	731 65	93.39	683 29	48 36	2,015 36	2,336 07	350 71
" ...	December..	594 72	86.54	514 67	80 05	1,941 08	2,447 21	536 13
	Total.....	1,901 99	.....	1,647 75	254 24	5,880 68	7,502 11	1,621 43
1886...	January.....	355 83	84.49	300 64	55 19	1,452 43	2,524 82	1,072 39
" ...	February...	395 58	78 72	311 40	84 18	1,578 27	2,436 60	858 33
" ...	March.....	286 44	73.32	209 92	76 52	1,529 19	2,345 40	816 21
	Total.....	1,037 85	.....	821 96	215 89	4,559 89	7,306 82	2,746 93
1886...	April.....	306 88	76.16	233 72	73 16	1,390 59	5,516 25	4,125 66
" ...	May	527 63	74.70	388 86	138 77	1,748 33	3,083 86	1,335 53
" ...	June.....	953 60	67.05	639 38	314 22	1,698 63	3,249 88	1,551 25
	Total.....	1,788 11	.....	1,261 96	526 15	4,837 55	11,849 99	7,012 44
1886...	July.....	1,827 74	63.09	1,148 16	654 58	2,768 03	3,380 20	612 17
" ...	August	1,434 72	72.84	1,045 05	389 67	3,360 94	3,037 62	329 95
	September.	1,176 98	74.84	880 85	296 13	3,015 25	3,660 94	645 69
72	Total.....	4,414 44	.....	3,074 06	1,340 38	9,152 85	10,078 76	927 91

Statement Showing Net Earnings Accruing, etc.—Continued.

Year.	Months.	Earnings accruing to L., C. & L. R'w'y on business from Nor. div. of C. & O. R. R.				Loss in operating Nor. div. of C. & O. R. R.		
		Earnings.	Percentage of operating expenses to earnings.	Expenses.	Net earnings.	Earnings.	Operating expenses.	Loss.
1886...	October.....	1,050 85	74.11	778 78	272 07	2,873 80	4,030 83	1,157 03
" ...	November..	803 22	91.28	733 18	70 04	2,324 29	2,888 80	564 51
" ...	December..	971 77	83.96	815 89	155 88	2,237 42	2,823 68	586 26
	Total.....	2,825 84	.....	2,327 85	497 99	7,435 51	9,743 31	2,307 80
1887...	January.....	695 49	82.92	576 70	118 79	1,782 84	3,007 57	1,224 73
" ...	February...	527 74	74 89	395 22	132 52	1,175 39	3,179 04	2,003 65
" ...	March.....	357 78	65.18	233 20	124 58	1,731 33	3,646 48	1,915 16
	Total.....	1,581 01	.....	1,205 12	375 89	4,689 56	9,833 09	5,143 53
1887...	April	402 45	87.28	351 26	51 19	1,391 06	3,164 30	1,773 24
" ...	May.....	661 47	73.08	483 40	178 07	2,174 54	4,005 82	1,831 28
" ...	June.....	1,353 31	70 76	957 60	395 71	1,792 21	2,075 47	283 26
	Total.....	2,417 23	.....	1,792 26	624 97	5,357 81	9,245 59	3,887 78
1887...	July.....	1,658 04	69.64	1,154 66	503 38	2,166 69	3,587 75	1,421 06
" ...	August.....	1,162 57	75.99	883 43	279 14	2,515 07	4,025 07	1,510 00
" ...	September.	1,000 33	63.21	632 31	368 02	1,992 41	4,075 00	2,082 59
	Total.....	3,820 94	.....	2,670 40	1,150 54	6,674 17	11,687 82	5,013 65
1887...	October.....	656 48	79.93	524 72	131 76	1,975 39	3,976 28	2,000 89
Total Oct. 1, '85, to Oct. 31, '87		20,443 89	.....	15,326 08	5,117 81	50,561 41	81,223 77	30,662 36
Dec. 1, '82, to Sept. 30, '85, as per statement filed in court		29,573 78	.....	24,615 11	4,958 67	73,446 83	103,987 57	30,540 74
Total Dec. 1, '82, to Oct. 31st, '87 ...		50,017 67	.....	39,941 19	10,076 48	124,008 24	185,211 34	61,203 10

Result.

73 Net earnings accruing to L., C. & L. R'w'y Co. from December 1st, '82, to Oct. 31st, '87, on business coming from or over the Northern division of Cumb. & Ohio railroad $10,076.48

Loss in operating the Northern division of Cumb. & Ohio railroad from December 1st, 1882, to October 31st, 1887..... $61,203.10

* Gain.

Louisville, Ky., December 9th, 1887.

The said answer of J. B. Wilder is in words and figures as follows, to wit:

Louisville Law and Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
L., C. & L. R. R. CO. ET AL., Defendants.

The defendant J. B. Wilder, for answer herein, says it is true he is the owner and holder of eighteen of said bonds of the Northern division of the Cumberland and Ohio Railroad Company, upon which no interest has been paid since the — day of December, 1883, and he will produce the same for inspection whenever necessary so to do, — asks for all general and special relief.

J. B. WILDER.

J. B. Wilder says he believes the statements of the foregoing answer are true.

74 J. B. WILDER.

Sworn to before me by J. B. Wilder this 9th day of March, 1886.

TYLER BARNETT,
N. P., J. C., Ky.

And at a court held for the court aforesaid on the 5th day of April, 1886—

On motion of defendant-, by counsel, the rule herein is respited until the 12th inst.

And at a court held for the court aforesaid on the 12th day of April, 1886—

Came plaintiff-, by counsel, and filed the affidavit of A. L. Schmidt herein and moved the court to make the rule herein absolute, and one week's time is given defendants to file counter-affidavits.

The said affidavit is in words and figures as follows, to wit:

Louisville Law and Equity Court.

A. L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., &c., Defendants. } Affidavit.

The plaintiff and affiant, A. L. Schmidt, says that the statements filed by the defendant herein of the net quarterly earnings accruing to the Louisville, Cincinnati and Lexington Railway Company by reason of business coming to it from or over the lines of the Northern division of the Cumberland and Ohio Railroad Company

75 — only reports or returns of exhibits — net earnings accruing to said corporation by reason of business coming to it in one direction from or over the lines of the Northern division of the Cumberland and Ohio Railroad Company, whereas said contract

and mortgage entitle plaintiff to the net earnings in both directions. It was so expressly understood by all the parties when said contract and mortgage were made, and the books of the said Louisville, Cincinnati and Lexington Railway Company, opened afterwards and kept for that purpose, show that the said company so understood at first, and said books will show that when the accounts were first opened the said earnings in both directions were set apart for the benefit of said bondholders under said contract and mortgage. This affiant says that the amount of net earnings reported is not correct; neither is the report of expenses nor the percentage of operating expenses to the earnings correct; neither the report of earnings nor expenses on either road is correct.

A. L. SCHMIDT.

Subscribed and sworn to by A. L. Schmidt before me this 12th day of April, 1886.

F. W. MORANCY,
Notary Public for Jefferson County, Ky.

And at a court held for the court aforesaid on the 19th day of April, 1886—

Came defendant The Louisville, Cincinnati and Lexington Railway Company, by counsel, and moved the court to strike from the files the affidavit of the plaintiff filed herein on the 12th
76 day of this month, and also moved the court to discharge the rule herein, and said motions were assigned to the 26th inst. for hearing; and without waiving either of said motions, but still insisting on the same, said defendant, by counsel, filed the affidavit of A. Barnett in response to that of plaintiff filed herein on the 12th inst.

Louisville Law & Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
L., C. & L. RAILWAY CO. ET AL., Defendants. } Affidavit.

Affiant, A. Barnett, says he is of counsel for defendant railway company since the filing of plaintiff's affidavit herein on the 12th inst.; he has examined the books of said defendant and finds that on one occasion only, 1st of January, 1881, the account against the N. D. of C. & O. R. R. Co. is charged with the net earnings accruing to defendant on its own lines on business coming "from over" and also on business going to said N. D. of C. & O. R. R. Co., but the statement from which said charge was made is made up to show said net earnings on business going in both directions, so they could be easily separable. By the terms of the contract between the two railroad companies the L., C. & L. R'y Co. was bound to pay the interest on the bonded debt of the other company until the latter's road was completed to Bloomfield, and at the time said charge was made said road was not completed and defendant had to pay said interest at any rate, and it was at that time not a matter of much

importance whether net earnings were charged on one or both directions, and he is advised said charge was so made by a
77 book-keeper who had no power to interpret the meaning of the stipulations of said contract, and, whether he had or not, the stipulation is so plain on its face as to show a palpable mistake in making the charge in that way.

Defendant's officers are not the same as those in charge of its affairs when the contract was entered into or said charge was made, and they claim that there was a latent dispute between the two companies on this subject and that it was never agreed or understood between the parties—the two companies—that any net earnings were so pledged to the payment of interest except such as were realized on its own lines on business "*coming from or over*" those of the N. D. of C. & O. R. R. Co.

A. BARNETT.

Sworn to before me by A. Barnett this 19th day of April, 1886.

JAMES S. BRYANT,
N. P., J. C., Ky.

And at a court held for the court aforesaid on the 26th day of April, 1886—

This action, having been heard, was submitted, and the court, not being advised, takes time.

And at a court held for the court aforesaid on the 24th day of May, 1886—

The court, being now advised, delivered a written opinion which was ordered to be, and now is, filed.

And it is considered and ordered that plaintiff's motion to
78 make the rule absolute be, and the same now is, overruled, but without prejudice to plaintiff's right to surcharge the accounts in other respects; to which plaintiffs except.

It is considered and ordered that defendant's motion to strike plaintiff's affidavit from the files be, and is, overruled.

It is further considered and ordered that defendant's motion to discharge the rule be, and it is, sustained at its cost, and said rule is now discharged at its cost.

The said opinion of the court is in words and figures as follows, to wit:

Opinion.

SCHMIDT, &C.,
vs.
THE LOU., CIN. & LEXINGTON RAILWAY CO.

On the 28th of July, 1879, the Louisville, Cincinnati and Lexington Railway Company leased from the Northern division of the Cumberland & Ohio R. R. Co. an unfinished line from Eminence to Bloomfield, and agreed to complete its construction with funds to be raised by a sale of certain mortgage bonds to be issued by the lessor company.

It was stipulated in the lease that the interest on these bonds should be met with the nett earnings of the leased line, and if these proved inadequate, then that the L., C. & L. Railway Company would "supply the deficiency, so far as it may be done, by appropriating the nett earnings, or so much as may be needed, on its own lines which may accrue by reason of business coming to it from or over the said first party's (the C. & O.'s) lines."

In order to make effectual this pledge of earnings by the L., C. & L. Railway Company, *whereby* it was provided that the
79 said company "does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern division of the Cumberland & Ohio R. R. Co."

The earnings on the leased line proved inadequate to pay interest on the bonds, and this suit was brought by the trustee and certain bondholders to compel an account from the L., C. & L. Railway Company of its earnings on business coming to it from the lines of the Cumberland and Ohio.

In response to a rule defendant has furnished a statement of earnings which, as interpreted by affidavits filed, appears to be an account of earnings from business coming to defendant from the Cumberland & Ohio, but not of business going from defendant to the Cumberland & Ohio.

The correctness of this construction of the lease and mortgage is now the question presented to the court.

What is meant by business coming to one railroad "from or over" the lines of another?

The court is referred to no authority, and no fact outside the written contracts affords any material assistance in their construction. It appears that the first statement on the books of the railroad company was so made as to show the earnings both ways, but this was at a time when by the terms of the lease it was bound to pay the interest in any event, and when therefore no statement was necessary. It also appears that the statement was only made once upon the books in that way, and it seems to the court to be of no value even in fixing the defendant's construction of the contract.

80 Looking, then, at the words as they stand in the contract, two considerations seem to the court to control their construction:

1st. Taking the words in their literal meaning, business coming to one company "from or over" the lines of another does not include business *going to* the latter company.

2nd. There seems to the court to be nothing in the circumstances of the contracting parties to control this apparent meaning of the words used. The lessee was willing in a certain contingency to surrender profits made on business coming to it from or over the lines of the Cumberland & Ohio, but it does not follow that it was willing to account for profits on business which it took to the Cumberland & Ohio.

The court is therefore of opinion that the defendant cannot be compelled to account for earnings on business taken by it to the

Cumberland & Ohio, and this being the only question presented in support of the motion to make the rule absolute, that motion is overruled, but without prejudice to plaintiff's right to surcharge the account in other respects.

Defendant's motion to strike plaintiff's affidavit from the files is overruled and its motion to discharge the rule is sustained at its costs.

81 ADOLPH SCHMIDT & Others
vs.
THE LOUISVILLE, CINCINNATI & LEX. R'W'Y CO. } Opinion.

OCT. 11, 1896.

This court decided in a former opinion that a contract between the Louisville, Cincinnati and Lexington Railway Company and the Northern division of the Cumberland & Ohio Railway Company and a subsequent mortgage made in pursuance of that contract, by which the former company pledged to certain bondholders of the latter the net earnings which might accrue to the mortgagor "by reason of business *coming to it* from or over" the lines of the Cumberland & Ohio, did not create a lien on business *going over* the lines of the mortgagor to those of the mortgagee.

A motion was afterwards made to read affidavits showing or attempting to show what the parties to these contracts meant by the language used, and this motion was overruled.

An amended petition is now tendered in which it is alleged that it was the intention of the parties to the contracts to pledge the earnings of the L., C. & L. railway on business going from it to the C. & O. as well as on business coming from that company, and that if the contract does not express that intention there was a mistake in drawing it which the plaintiffs ask to have corrected.

82 Referring to the act of March 18th, 1878, by which the corporations concerned were empowered to make these contracts, the court finds that it authorizes the L., C. & L. Railway Co. to pledge business "coming to them and over their roads from said Cumberland & Ohio Railroad Company."

This is almost the exact language of the contracts, and by an act of M'ch 29, 1880, the contracts themselves are ratified and declared valid. The power of the corporations to make these contracts is derived from the statute, and they have pursued the exact language of the act.

If they intended to do anything more they intended to exceed the law and wisely refrained from doing so.

It seems to the court that the rights of these parties must be determined by the language of the contracts they actually made and were by law authorized to make, and the motion to file amended petition is overruled.

And at a court held for the court aforesaid on the 18th day of October, 1886—

ADOLPH L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, &c., Defendants.

Came plaintiffs, by counsel, and produced in court herein a bill of exceptions, which was signed, sealed, and enrolled by the judge and ordered to be filed and made a part of the record herein, which is done.

83 The said bill of exceptions *are* in words and figures as follows, to wit:

Louisville Law & Equity Court.

ADOLPH L. SCHMIDT, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI & LEXINGTON Railway Co., &c., Defendants. } Bill of Exceptions.

Be it remembered that on the 27th day of September, 1886, the plaintiffs tendered in court and offered to file an amended petition herein in words and figures as follows:

Louisville Law & Equity Court.

ADOLPH L. SCHMIDT, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON Railway Company, &c., Defendants. } 1860. Amended Petition.

The plaintiffs, by leave of court, amend their petition herein and say that at the time the contract of lease between the defendant The Northern Division of the Cumberland and Ohio Railroad Company and the defendant The Louisville, Cincinnati and Lexington Railway Company, mentioned in the original petition herein, was written and signed it was clearly understood and intended and expressly agreed between the parties thereto that if the net earnings upon the lines of the Northern division of the Cumberland and Ohio Railroad Company should not prove sufficient to pay the interest and provide for the sinking fund on said mortgage bonds, then if all other sources of raising money of said Northern
84 division of the Cumberland and Ohio Railroad Company should prove insufficient the Louisville, Cincinnati and Lexington Railway Company would supply the deficiency as far as it might be done by appropriating the net earnings or so much as might be needed on its own lines which might accrue to it by reason of business passing over its own lines to the lines of the Northern division of the Cumberland and Ohio Railroad Company as well as of the business passing over its own lines from the lines of the Northern division of the Cumberland and Ohio Railroad Company, and that it was intended and agreed by all parties to said lease that

it should be so drawn as to contain in express terms that agreement.

Plaintiffs say that the lease drawn as set out in the original petition and as filed therewith does, as they construe it, contain the aforesaid agreement, but inasmuch as this court has upon a motion entered herein construed said lease otherwise, plaintiffs say that said lease as drawn, in so far as it fails to provide for a pledge of the profits of the Louisville, Cincinnati and Lexington Railway Company on its own lines arising from business passing both ways over its own lines to and from the lines of the Northern division of the Cumberland and Ohio Railroad Company, in accordance with said agreement and understanding, is erroneous and was so drawn through mistake of the parties thereto and of the draftsman thereof, but in all other respects it is correct.

85 Plaintiffs say, further, that at the time the mortgage from defendant The Louisville, Cincinnati and Lexington Railway Company to Joshua F. Speed, as trustee, mentioned in the original petition, was written and executed it was intended and expressly agreed between all parties thereto that for the purpose of making effectual the agreement hereinbefore mentioned said Louisville, Cincinnati and Lexington Railway Company should mortgage to said Speed and put in lien all net earnings which might accrue to it by reason of business passing over its own lines to the lines of the Northern division of the Cumberland and Ohio Railroad Company as well as of business passing over its own lines from the lines of the Northern division of the Cumberland and Ohio Railroad Company, and that it was intended and agreed by all parties to said mortgage that it (said mortgage) should be drawn so as to contain in express terms that agreement and to carry out that intention.

Plaintiffs say that the mortgage drawn as set out in the original petition and as filed therewith does, as they construe it, contains the aforesaid agreement and intention, but inasmuch as this court has upon a motion entered herein construed said mortgage otherwise, plaintiffs say that said mortgage as drawn in so far as it fails to contain and express the parties' intention and agreement as above mentioned is erroneous and was drawn through mistake of the parties thereto and of the draftsman thereof, but otherwise it is correct.

86 Plaintiffs say that it is either true that said contract of lease and mortgage as drawn give to plaintiffs and other holders of said mortgage bonds the benefit of the net earnings of defendant The Louisville, Cincinnati and Lexington Railway Company on its own lines arising from business passing both ways over the lines of the Northern division of the Cumberland and Ohio Railroad Company, or the parties' agreement so to do was omitted therefrom by mistake, as above stated, and plaintiffs do not know which is true.

Wherefore plaintiffs, repeating all the allegations of their petition, as heretofore amended, not inconsistent with this amendment, pray that so — as necessary to do so said contract of lease and said mortgage be reformed so as to express clearly and in unmistakable terms

the parties' intention and understanding and agreement as heretofore set out.

They pray further as in their original petition, and for costs and all proper relief.

SIMRALL & BODLEY,
Att'ys for Pl'ffs.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

The affiant, Leander S. Reed, says he is one of the plaintiffs in the above-styled action, and that the statements of the foregoing amended petition are true.

LEANDER S. REED.

Subscribed and sworn to by said Leander S. Reed before me this 16th day of September, 1886.

F. W MORANCY,
87 *Notary Public for Jefferson County, Ky.*

To which motion the defendant The Louisville, Cincinnati and Lexington Railway Company objected, and said motion to file was then submitted.

Afterwards, to wit, on the 11th day of October, 1886, the court, having taken time to consider and being advised, overruled said motion of plaintiffs and refused to allow said amended petition to be filed; to which ruling of the court plaintiffs then excepted and still except; and two weeks' time having been given to plaintiffs to prepare a bill of exceptions, they come now and tender to court this bill of exceptions, and ask that it be signed, sealed, and made part of the record herein, which is done.

W. O. HARRIS, *Judge.*

And at a court held for the court aforesaid on the 8th day of November, 1886—

This action having been set at rules by defendants on the 1st inst.,

Came defendants, by counsel, and moved the court to set aside the order of reference herein, and moved the court to submit this action; to all of which plaintiffs, by counsel, object.

Came plaintiffs and moved the court to remand this ac-
88 tion; to which defendants, by counsel, object; and said motions, coming on to be heard, were submitted, and the court, not being advised, takes time.

Came plaintiffs, by counsel, and moved the court to require the defendant The Louisville, Cincinnati & Lexington Railway Company to produce to the commissioner of the Louisville chancery court the quarterly returns to date of the net earnings of said defendant company over the lines of the Northern division of the Cumberland & Ohio Railroad Company and over its lines which accrued to it by reason of business coming to it from or over the lines of said Northern division of the Cumberland & Ohio Railroad Company.

And at a court held for the court aforesaid on the 17th day of November, 1886—

The court being now advised, it is considered and ordered that plaintiffs' motion to remand this action be and is now sustained, and this action is ordered to be and now is remanded.

It is further considered that defendant's motion to submit this action and motion to set aside the order of reference herein be and they are now overruled.

And it is further ordered that defendant The Louisville, Cincinnati and Lexington Railway Company produce to the commissioner of the Louisville chancery court the quarterly returns from September 30th, 1885, to November 1st, 1886, of the net earnings
89 of the said defendant company over the lines of the Northern division of the Cumberland and Ohio Railway Company and over its own lines which accrued to it by reason of business coming to it from or over the lines of said Northern division of the Cumberland and Ohio Railway Company.

And at a court held for the court aforesaid on the 5th day of December, 1887—

On motion of plaintiff-, by counsel, it is ordered that the defendant The Louisville, Cincinnati & Lexington Railway Company produce to the commissioner of this court a statement of the monthly net earnings of the Louisville, Cincinnati and Lexington Railway Company on its own lines which accrued to it by reason of business coming to it from or over the lines of the Northern division of the Cumberland and Ohio Railroad Company from the 1st of October, 1885, to the 1st of December, 1887; to which the defendant excepts.

And the motion of defendant to set aside the amended order of reference is overruled; to which defendant excepts.

And at a court held for the court aforesaid on the 9th day of January, 1888—

On motion of defendant by counsel, its exceptions heretofore filed in office to commissioner's report are now noted of record as filed in court.

90 And said defendant, moved the court for leave to take proof in support of said exceptions; to which plaintiffs object, and said motion is sustained and leave is given defendant to take proof in support of said exceptions; to which plaintiffs except.

Said exceptions are in words and figures as follows, to wit:

Louisville Law & Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
L., C. & L. R'Y CO., &c., Defendants. } Exceptions.

The defendant excepts to the commissioner's report filed herein with respect to net earnings, made by Deputy Commissioner Calvert, and shows for exception thereto:

1. Amount claimed by the commissioner, to wit, $4,000.00, for making said report, is largely in excess of the value of the services rendered. The services were rendered by Calvert under a special contract by which he was to receive $125.00 per month during the time that he was necessarily engaged in making up said report, and he was not so engaged more than four months of proper working time making up *up* the same. Calvert was not furnished office room, stationary, or any facility whatever by the commissioner, and the commissioner never had any care, control of, or responsibility on account of the report, the same having been made up or the materials gathered therefor in the offices of the Louisville & Nashville Railroad Company.

2. Said Deputy Commissioner Calvert has omitted from
91 his estimates as to net earnings many items of expense necessarily incurred and expended in the operations of the railroad. These items being large and too numerous to set out in exceptions, therefore defendant asks leave to show such items in detail by evidence.

3. Said deputy commissioner rejects all allowance for rent of rolling stock, although it was expressly provided in the lease, out of which the plaintiffs' rights are supposed to originate.

4. Said deputy commissioner charges the railroad company with a large amount of supposed earnings from mail carriage and the carriage of express matter, and does so arbitrarily, without any basis for fixing the amount that should be so charged, if anything; that properly no charge should be made on either of these accounts, or, if mistaken in this, only sums much less in amount, the items of which are too lengthy to incorporate in exceptions, but defendant will show the same in proof.

5. Said report embraces near 5,000 pages and descending into innumerable and unnecessary particulars with the effect, if not intent, to stuff and puff the size of the report to increase and enhance the supposed value of services, when the whole matter might have been put in tabulated form on three or four ordinary sheets of paper.

Wherefore defendant asks that said report be suppressed and set aside and the principles for a new report be settled by the
92 court, so that a correct and condensed report may be made within reasonable compass.

BARNETT, NOBLE & BARNETT.

And at a court held for the court aforesaid on the 30th day of April, 1888—

ADOLPH L. SCHMIDT, &c., Plaintiffs,
vs.
L., C. & L. RAILWAY COMPANY, &c., Defendants.

Came plaintiffs, by counsel, and filed exceptions to the commissioner's report herein.

The said exceptions to the report of the commissioner are in words and figures as follows, to wit:

Louisville Law & Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI AND LEXINGTON Railway Co., &c., Defendants.
} Pl'ffs' Exceptions to Commissioner's Report.

The plaintiffs except to the commissioner's report filed herein on the following grounds, to wit:

First. They say that the claim made by the commissioner of $4,000 for making said report is largely in excess of the value of his services and unreasonable.

His examination as to the earnings and operating expenses of the Northern division of the Cumberland and Ohio Railroad Company to see if there would be any net revenue therefrom was wholly unauthorized and unnecessary and in violations of instructions,
93 because it was positively known in advance that there would be no net revenue from that source. There was much other work done that was wholly unnecessary, and the price charged for what was done is excessive and exorbitant.

Second. The said report is erroneous in that it only undertakes to exhibit and give the net earnings of the Louisville, Cincinnati and Lexington Railway Company on business coming to it in one direction from the Northern division of the Cumberland and Ohio Railroad Company, and takes no account of the net profits (which are large) to the Louisville, Cincinnati and Lexington railway on business coming to it in the other direction over the lines of the Northern division of the Cumberland and Ohio railroad, whereas under the lease contract and mortgage upon said *nett* earnings to secure pl'ffs' said bonds and interest as well as under the order of reference to the commissioner the plaintiffs are entitled to said net earnings in both directions.

Third. The said report is erroneous in that it does not give and state all the *nett* earnings in the one direction which it undertakes to give.

Fourth. The said report is erroneous in that in estimating the nett earnings — the Louisville, Cincinnati and Lexington Railroad Company which accrued to it by reason of business coming to it from over the lines of the Northern division of the Cumberland and Ohio Railroad Company the said report deducts from the gross
94 earnings of said business coming from the lines of the Northern division of the Cumberland and Ohio Railroad Company a certain proportion of the salaries of all officers and employees and running and other expenses of the Louisville, Cincinnati and Lexington Railroad Company as well as of the Louisville & Nashville Railroad Company and all other systems and railroads belonging to or under the control of said Louisville & Nashville Railroad Company, whereas under the said contract and mortgages securing said bonds and interest no costs or expenses could be deducted from said gross earnings except such as were incidental to or grew out of

said business coming from or over the Northern division of the Cumberland and Ohio Railroad Company.

Fifth. Said report is erroneous in that there is a branch railroad running from Shelbyville, Kentucky, to Anchorage, Kentucky, where it connects with the original Louisville, Cincinnati and Lexington Railway Company, and this branch railroad was leased many years ago by said Louisville, Cincinnati and Lexington Railway Company from its owners, to wit, on the — day of ——, 18—, for the term of 30 years, and has been operated by said railroad company since then, and the said branch railroad forms a part of the lines of the said Louisville, Cincinnati and Lexington Railway Company and have been a part of the lines of said railway company ever since said lease was made. The said branch road has always connected at Shelbyville with the said Northern division
95 of the Cumberland and Ohio Railroad Company, and all business coming to the Louisville, Cincinnati and Lexington Railway Company from or over the Northern division of the Cumberland and Ohio Railroad Company passes over the said branch road running from Shelbyville to Anchorage, and the net profiles of net earnings from said business to said Louisville, Cincinnati and Lexington Railroad Company over its said leased lines have been great during all the time since said lease was made, to wit, the sum of $—, and said net earnings or profits are covered by said contract and mortgage to secure the bonds and interest held by plaintiffs, and the plaintiffs are entitled to and own said nett earnings as security for payment of said bonds and interest, and the said report takes no notice or account whatever of the nett earnings over these leased lines of the said defendant, and the plaintiffs have never received any part thereof, and no part thereof has never been paid or accounted for to any of said bondholders or any one for them.

Sixth. The report is erroneous in this also, that the profits realized by the Louisville, Cincinnati and Lexington Railroad Company on passenger and freight business coming to it from the Northern division of the Cumberland & Ohio Railway Co. is much larger (and more freight charged therefor) than on the through business of said Louisville, Cincinnati — Lexington Railroad Company *Company*, and yet, in violation of plaintiffs' rights, the said report, in estimating the said profits makes no allowance for these profits
96 in excess of profits on through business of the Louisville, Cincinnati and Lexington Railroad Co., but prorates the profits on this business from the Cumberland and Ohio Railway Company with the profits on the through business of the Louisville, Cincinnati and Lexington Railroad Company, thereby materially diminishing the nett profits to which pl'ffs are entitled under the terms of said lease and mortgage, to wit, in the sum of $—, and the plaintiffs ask and reserve the right to take proper testimony as to all these matters not appearing in this record.

SIMRALL & BODLEY,
Att'ys for Plaintiffs.

And at a court held for the court aforesaid on the 20th day of June, 1888—

Came the defendant railway company, by counsel, and moved the court to quash and set aside the commissioner's report filed herein, because the same was made by one E. C. Calvert, a person not fit and impartial to pass upon the questions in dispute between the parties, and moved the court to read, on the hearing of this motion, the affidavit of said Calvert filed herein in support of the commissioner's motion to make an allowance of $2,000.00 on account, and also moved the court, for the reasons aforesaid, to deny any allowance to said commissioner on account of said report which is to be taxed as costs in this action.

And this action is postponed until 23rd inst. for hear-
97 ing on pending motions at 3 o'clock.

And at a court held for the court aforesaid on the 23rd day of June, 1888—

Ordered that this action be and now is postponed until 26th inst., with leave to all parties to take depositions on notice.

And at a court held for the court aforesaid on the 25th day of June, 1888—

This action having been set at rules on the 18th inst. by plaintiffs,

This day came plaintiffs and on their motion leave is given them to retake the depositions of A. L. Schmidt and Leander Reed herein.

And on plaintiffs' motion it is ordered that this action be postponed until July 2nd, 1888, for hearing on plaintiffs' and defendant's exceptions to the commissioner's report, with leave to both plaintiffs and defendants to take depositions on notice to be read on said hearing.

And at a court held for the court aforesaid on the 2nd day of July, 1888—

Ordered that this action be and is remanded.

The court being now advised, it is considered and ordered that defendant's motion to quash the commissioner's report herein be and now is overruled; to which the defendant excepts.

98 COMMONWEALTH OF KENTUCKY, *set:*

Louisville Law and Equity Court.

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, certify that the within and foregoing 147 pages contain a true and complete transcript of a portion of the record and proceedings had in said Louisville law and equity court in an action lately pending therein wherein Adolph L. Schmidt and others were plaintiffs and The Louisville, Cincinnati and Lexington Railway Company and others were defendants, as appears of record in my said office, and which record is further and fully certified in volume # 2.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, at the court-house, in the city of Louisville, this the 5th day of December, 1888.

JNO. H. WELLER,
Clerk Lou. Ch'y Ct. & ex Officio Clerk Lou. Law & Equity Court.

99 Afterwards on the foregoing transcript the appellants, by their att'ys, made the following statement:

Superior Court of Kentucky.

ADOLPH L. SCHMIDT, Individually and as Trustee for Owners of Bonds of the Northern Division of the Cumberland & Ohio Railroad Company, Jacob Peter, James McCarty, George H. Breed, P. Booker Reed, Leander S. Reed, Eliza S. Reed, Jane M. Reed, *Eliza S. Reed*, W. C. Reamer, and Jacob Krieger, Sr., for Themselves and Other Owners of said Bonds, are All the *Appellants*,

vs.

J. SEL. MILLER, the Only *Appellee*.

The *judgment* is found on page 144 and 144½ of this record, and the parties are all resident in Louisville, Ky. The judgments were rendered on 3d July, 1888, and 2d of August, 1888. The foregoing are all the parties appellant & appellee.

SIMRALL & BODLEY,
Att'ys for Appellants.

Dec. 5, 1888.

All the proceedings on this appeal in the appellate court are not copied into this transcript by agreement of parties.

100 Afterwards, on the 13th day of August, 1892, the appellants, A. L. Schmidt and others, by counsel, filed in the office of the clerk of the said court of appeals a transcript in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

A. L. SCHMIDT, &c., Plaintiffs,

vs.

THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY CO., &c., Defendants.

Pleas before the honorable judge of the Louisville law and equity court, at the court-house, in the city of Louisville, State of Kentucky, on the dates hereinafter mentioned.

At a court held for the court aforesaid on the 18th day of November, 1889—

This action having been set at rules by plaintiff on 11th inst. on exceptions to the commissioner's report—

Came defendant, by counsel, and filed additional exceptions to commissioner's report herein.

And leave is given it to cross-examine Jacob Krieger.

And this action is assigned to 26th inst. for hearing on exceptions to the commissioner's report.

Said exceptions are in words and figures following, to wit:

101 Louisville Law and Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
L., C. & L. R'Y CO. ET AL., Defendants.

This day came defendant, by counsel, and asked leave to file additional exceptions to the report of the special commissioner herein, and shows for ground of exceptions that said report was made up while the said commissioner was illegally in the employment and monthly pay of the plaintiffs at an excessive salary, and for that reason the report should be set aside, and in no event should any allowance be made to or for said commissioner to be taxed as costs against the defendants.

BARNETT, MILLER & BARNETT, *Att'ys.*

At a court held for the court aforesaid on the 26th day of November, 1889—

Ordered that this action be, and now is, postponed until 29th inst. for hearing.

At a court held for the court aforesaid on the 29th day of November, 1889—

This action is now postponed until December 2nd, 1889.

At a court held for the court aforesaid on the 2nd day of December, 1889—

102 Ordered that this action be, and now is, postponed until the 9th inst. for hearing.

At a court held for the court aforesaid on the 9th day of December, 1889—

Ordered that this action be, and is now, postponed until 16th inst. for hearing.

At a court held for the court aforesaid on the 16th day of December, 1889—

Ordered that this action be, and now is, postponed until January 6th, 1890, for hearing.

At a court held for the court aforesaid on the 6th day of January, 1890.

This action is now postponed until 13th inst.

At a court held for the court aforesaid on the 13th day of January, 1890—

Ordered that this action be, and now is, postponed until 20th inst. for hearing.

At a court held for the court aforesaid on the 20th day of January, 1890—

This action is now postponed until 28th int. for hearing.

At a court held for the court aforesaid on the 28th day of
103 January, 1890—

Came plaintiffs, by counsel, and filed an amended petition herein.

Said amended petition is in words and figures following, to wit:

Louisville Law & Equity Court.

A. L. SCHMIDT, &c., Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI AND Lexington Railway Co., &c., Defendants. } 1860. Amended Petition.

The plaintiffs amend their petition and say it is true that all other sources of raising money of said first party, The Northern Division of the Cumberland and Ohio Railroad Company, had and has proved insufficient, and there have been no net earnings from said Cumberland and Ohio road or company.

SIMRALL & BODLEY,
Att'ys for Pl'ffs.

The affiant, A. L. Schmidt, says the allegations in the foregoing amended petition are true.

A. L. SCHMIDT.

Subscribed and sworn to by A. L. Schmidt before me this 28th day of January, 1890.

THOS. R. SINTON,
Notary Public, J. C.

At a court held for the court aforesaid on the 28th day of January, 1890—

104 This action, having been heard on exceptions to commissioner's report, is now submitted, and the court, not being advised, takes time.

At a court held for the court aforesaid on the 25th day of February, 1890—

This action having been heard and submitted on exceptions to the commissioner's report, and the court being sufficiently advised, it is ordered that the defendants' 1st exception is sustained to the extent of the excess over the fee already allowed the commissioner.

The defendants' 2nd, 3rd, and 5th exceptions are overruled; *his* 4th exception is reserved until further report is made.

The plaintiffs' 1st exception is sustained to the extent of the excess over the fees already allowed.

The plaintiffs' 2nd, 3rd, 4th, 5th, and 6th exceptions are sustained, and it is ordered that this action be referred to the commissioner with directions to allow and report to the court all the net earnings which have accrued to the Louisville, Cincinnati & Lexington Railway Company by reason of business coming to it from or over the lines of the Northern division of the Cumberland and Ohio Railroad Company, and in estimating these profits the commissioner will take into account the profits to said Louisville, Cincinnati & Lexington Railway Company on its Shelby branch (which is leased by it and operated as a part of its lines of road) on business coming to it from or over the lines of the said Northern division of the Cumberland and Ohio Railroad Company.

105 The court is of the opinion that the plaintiffs and other holders of said bonds in the petition mentioned are entitled to *set* net earnings of the Louisville, Cincinnat*ti* & Lexington Railway Company on business coming to it from or over the lines of said Northern division of the Cumberland & Ohio Railroad Company in both directions, and the commissioner will ascertain and report said net earnings accordingly.

In estimating these net earnings, the commissioner will first ascertain the gross earnings and then deduct therefrom only the additional cost and expense entailed upon the Louisville, Cincinnat*ti* & Lexington Railway Company by reason of said business coming to it from or over the lines of the said Northern division of the Cumberland and Ohio Railroad Company.

And these expenses should be estimated according to the services rendered—that is to say, according to the amount of freight and number of passengers transported by the company and the distance hauled—and not according to the compensation received by the company for such service.

The said Louisville, Cincinnat*ti* & Lexington Railway Company having been fully equipped with officers, rolling stock, and other appliances and running at time said contract was made, the commissioner will not deduct from said gross earnings any costs or expenses which were necessarily incurred by the said company, whether it had received and transacted said business or not. The commissioner will also report the owners of all the bonds sued on in the petition.

To all of which defendant excepts.

106 At a court held for the court aforesaid on the 8th day of December, 1890—

The defendant files a notice, duly served, on plaintiffs' counsel and moves the court to modify and correct the order of reference herein to the commissioner on 25th of February, 1890, in the following respects:

1st. To direct the commissioner in making the report ordered

therein not to include any of the profits derived from the Shelby railroad.

2nd. To direct the commissioner in making the report only to include in said profits the profits, if any, accruing to it on business coming to it over the lines of the Cumberland & Ohio Railroad Company (Northern division) and to exclude the profits on business on its own lines going to the lines of the Northern division of the Cumberland & Ohio Railroad Co.

3rd. To direct the commissioner in ascertaining net profits to be guided by the amounts actually received for doing said business and making deductions for a reasonable share of expenses incurred by the defendant in doing said business, although it may have been fully equipped with officers and rolling stock at the making of the contract sued on.

To which motion the plaintiff objects.

Said notice is in words and figures following, to wit:

Louisville Law and Equity Court.

107 A. L. SCHMIDT, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Co., Defendants. } 1860. Notice.

Simrall & Bodley, attorneys for the plaintiff in the above-styled action, will take notice that on Monday, the 8th day of December, 1890, at the motion hour, we will move the court to modify the order of reference herein made on the 25th day of February, 1890, in the respects which will appear in said motion.

BARNETT, MILLER & BARNETT, *For Def't.*

Came to hand Dec. 6th, 1890, and served on J. G. Simrall by delivering to him an exact copy of this notice this 6th Dec., 1890, at 4.15 p. m. I am over sixteen years of age and am not a party to nor interested in this case. I swear that above statements are true.

HERMAN NETTLEROTH.

Subscribed and sworn to before me this 6th day of Dec., 1890, by Herman Nettleroth.

SHACKELFORD MILLER,
N. P., Jeff. Co., Ky.

At a court held for the court aforesaid on the 19th day of January, 1891—

By consent of parties, by counsel, this action is assigned to 20th inst. for hearing

108 At a court held for the court aforesaid on the 20th day of January, 1891—

The court being now advised, the motion of defendant entered herein December 8th, 1890, is now overruled; to which defendant excepts.

This day came plaintiff, by attorney, and also the defendant railroad company, by its attorney, and on motion of plaintiff and by consent of defendant railroad company the order of reference entered herein as of 25th February, 1890, is hereby referred for execution to Robert E. Sewell, said railroad company still objecting to the correctness of said order of reference and without waiving said objection; and thereupon came the plaintiff and filed in court the report of the said Sewell, as in obedience to the said order of reference, and it is agreed that the said report shall be subject to all legal exceptions of either party as if the same had been made by a regular commissioner of this court, and the same is laid over two weeks for exceptions to it.

The following is the report of R. E. Sewell referred to in the foregoing order:

109 *Net Earnings Derived by L., C. and L. R'y on Passengers Coming from & over C. and O. R. R., Northern Div., Arrived at as per Instructions of Law and Equity Court, Entered February 25th, 1890.*

Fiscal year.	Division.	*Operating expenses, passenger.	Number of passengers carried one mile.	Cost per passenger per mile.	Number of passengers carried over one mile coming from or over C. & O., Northern div.	Cost per passenger.	Cost of passenger from C. & O., N. div.	Revenue on passenger from C. & O., N. D.	Net revenue on passengers from C. & O., N. div.
1882-'83—Dec. 1st, '82, to June 30th, 1883	Cincinnati	33,020 79	7,688,926	.4294	59,078	.4294	253 68	1,691 58	1,437 90
	Lexington	30,337 12	3,445,323	.8805	7,455	.8805	65 64	200 38	134 74
	Shelby	1,659 12	536,733	.3092	98,403	.3092	304 26	2,804 84	2,500 58
							623 58	4,736 80	4,133 22
1883-'84—July 1st, 1883, to June 30th, 1884	Cincinnati	62,079 23	16,702,308	.3686	141,355	.3686	522 45	3,912 41	3,389 96
	Lexington	47,862 69	7,896,382	.6061	18,651	.6061	113 05	530 61	417 56
	Shelby	2,976 47	1,039,941	.2862	221,231	.2862	633 20	6,153 43	5,520 23
							1,268 70	10,596 45	9,327 75
1884-'85—July 1st, 1884, to June 30th, 1885	Cincinnati	51,536 11	15,501,364	.3325	121,883	.3325	405 21	3,458 90	3,053 69
	Lexington	30,536 24	6,419,820	.4725	8,889	.4725	42 05	254 37	212 32
	Shelby	2,212 84	815,889	.2712	197,352	.2712	535 25	5,534 57	4,999 32
							982 51	9,247 84	8,265 33
1885-'86—July 1st, 1885, to June 30th, 1886	Cincinnati	52,107 39	13,713,266	.3800	135,457	.3800	514 70	3,200 17	2,685 47
	Lexington	28,518 08	6,672,155	.4274	16,042	.4274	68 56	359 73	291 17
	Shelby	2,157 88	856,755	.2495	210,530	.2495	525 33	4,914 62	4,389 29
							1,108 59	8,474 52	7,365 93
1886-'87—July 1st, 1886, to June 30th, 1887	Cincinnati	55,805 91	15,025,048	.3718	119,020	.3718	444 93	3,297 67	2,852 74
	Lexington	22,940 19	6,772,159	.3387	16,746	.3387	56 72	446 95	390 23
	Shelby	2,892 32	904,579	.3197	182,856	.3197	584 59	5,081 51	4,496 92
							1,086 24	8,826 13	7,739 89
1887-'88—July 1st, 1887, to June 30th, 1888	Cincinnati	67,687 42	15,502,705	.4366	126,760	.4366	553 43	3,445 81	2,892 38
	Lexington	20,734 62	7,065,552	.3359	17,033	.3359	57 21	480 81	423 60
	Shelby	3,060 10	845,933	.3617	182,277	.3617	659 30	4,936 70	4,277 40
							1,269 94	8,863 32	7,593 38
1888-'89—July 1st, 1888, to June 30th, 1889	Cincinnati	74,875 30	16,998,551	.4405	118,582	.4405	522 33	3,154 11	2,631 78
	Lexington	23,254 52	6,877,184	.3381	14,934	.3381	50 49	383 17	332 68
	Shelby	3,261 40	744,340	.4382	176,247	.4382	772 24	4,650 65	3,878 41
							1,345 06	8,187 93	6,842 87
1889-'90—July 1st, 1889, to June 30th, 1890	Cincinnati	84,668 47	17,472,634	.4846	127,889	.4846	619 67	3,582 72	2,963 05
	Lexington	25,471 10	7,297,371	.3490	16,779	.3490	58 56	360 22	301 66
	Shelby	2,058 46	725,730	.2836	202,343	.2836	573 92	5,572 89	4,998 97
							1,252 15	9,515 83	8,263 68

* NOTE—Increased tonnage causes increased wear and tear on rolling stock and rails and requires more power; hence a proportion of repairs to rolling stock and cost of renewal of rails and of fuel and water consumed by locomotives are charged as increased expenses due to this business. No other items of expense are included. (R. E. S. No 1.)

Net Earnings Derived by L., C. and L. R'y on Freight Coming from or over the C. and O. R. R., Northern Div., Arrived at as per Instructions of Law and Equity Court Entered February 25th, 1890.

Fiscal year.	Division.	*Operating expenses, freight.	Tons of freight carried one mile.	Cost per ton per mile.	Tons of freight carried one mile coming from or over C. & O., N. D.	Cost per ton.	Cost of freight from C. & O., North. div.	Revenue on freight from C. & O., N. div.	Net revenue on freight from C. & O., North. div.
1882-'83—Dec. 1st, 1882, to June 30th, 1883...	Cincinnati	50,529 62	24,317,034	.2078	186,274	.2078	387 07	6,091 21	5,704 14
	Lexington	20,412 09	5,084,345	.4015	9,635	.4015	38 68	247 16	208 48
	Shelby	1,856 97	555,177	.3345	186,565	.3345	624 02	6,874 88	6,250 86
							1,049 77	13,213 25	12,163 48
1883-'84—July 1st, 1883, to July 30th, 1884.....	Cincinnati	100,312 16	50,612,873	.1982	402,614	.1982	797 98	11,117 95	10,319 97
	Lexington	36,954 63	15,595,975	.2369	36,407	.2369	86 25	927 58	841 33
	Shelby	3,172 28	765,636	.4143	327,308	.4143	1,356 04	11,401 17	10,045 13
							2,240 27	23,446 70	21,206 43
1884-'85—July 1st, 1884, to June 30th, 1885.....	Cincinnati	92,636 53	57,217,258	.1619	328,546	.1619	531 92	10,413 52	9,881 60
	Lexington	33,823 41	18,554,420	.1823	48,249	.1823	87 95	988 72	900 77
	Shelby	2,617 19	783,994	.3338	302,851	.3338	1,011 00	11,321 65	10,310 65
							630 87	22,723 89	21,093 02
1885-'86—July 1st, 1885, to June 30th, 1886.....	Cincinnati	103,520 70	66,706,833	.1552	298,526	.1552	463 27	8,668 67	8,205 40
	Lexington	35,128 04	20,702,011	.1696	23,889	.1696	40 50	453 20	412 70
	Shelby	2,364 64	656,322	.3602	270,855	.3602	975 62	9,223 14	8,247 52
							1,479 39	18,345 01	16,865 62
1886-'87—July 1st, 1886,— June 30th, 1887.....	Cincinnati	136,290 00	87,344,117	.1560	398,156	.1560	621 12	12,008 76	11,387 64
	Lexington	41,885 02	29,602,093	.1415	31,581	.1415	44 68	513 24	468 56
	Shelby	3,499 54	934,374	.3745	394,826	.3745	1,478 62	14,278 14	12,799 52
							2,144 42	26,800 14	24,655 72
1887-'88—July 1st, 1887, to June 30th, 1888.....	Cincinnati	184,851 64	101,165,897	.1827	369,137	.1827	674 41	9,919 94	9,245 53
	Lexington	45,965 79	28,703,928	.1601	17,484	.1601	28 00	355 04	327 04
	Shelby	3,751 04	779,918	.4810	293,327	.4810	1,410 76	10,329 12	8,918 36
							2,113 17	20,604 10	18,490 93
1888-'89—July 1st, 1888, to June 30th, 1889.....	Cincinnati	182,225 76	104,355,484	.1746	329,594	.1746	575 54	9,277 90	8,702 36
	Lexington	37,365 04	26,662,549	.1401	31,723	.1401	45 45	694 89	649 44
	Shelby	3,052 33	700,875	.4355	329,099	.4355	1,433 22	11,373 75	9,940 53
							2,054 21	21,346 54	19,292 33
1889-'90—July 1st, 1889, to June 30th, 1890.....	Cincinnati	213,953 86	127,471,717	.1678	326,350	.1678	547 75	10,457 63	9,909 88
	Lexington	25,043 33	14,905,083	.1680	14,855	.1680	24 95	353 40	328 45
	Shelby	2,735 66	691,468	.3956	338,173	.3956	1,337 91	11,390 28	10,052 37
							1,910 61	22,201 31	20,290 70

*Note.—Increased tonnage causes increased wear and tear on rolling stock and rails and requires more power; hence a proportion of repairs to rolling stock and cost of renewal of rails and of fuel and water consumed by locomotives are charged as increased expenses due to this freight. No other items of expense are included.

R. E. S. No. 1.

111 *Recapitulation.*

Net earnings derived by L., C. & L. R'y on passenger- and freight coming from or over C. and O. R. R., Northern div., arrived at as per instructions of law and equity court, entered February 25th, 1890.

Fiscal year.	Divisions.	Passenger-.	Freight.	Total.
1882-'83—Dec. 1st, 1882, to June 30th, '83	Cincinnati	1,437 90	5,704 14	7,142 04
	Lexington	134 74	208 48	343 22
	Shelby	2,560 58	6,250 86	8,811 44
	Total	4,133 22	12,163 48	16,296 70
1883-'84—July 1st, 1883, to June 30th, 1884	Cincinnati	3,389 96	10,319 97	13,709 93
	Lexington	417 56	841 33	1,258 89
	Shelby	5,520 23	10,045 13	15,515 36
	Total	9,327 75	21,206 43	30,534 18
1884-'85—July 1st, 1884, to June 30th, 1885	Cincinnati	3,053 69	9,881 60	12,935 29
	Lexington	212 32	900 77	1,113 09
	Shelby	4,999 32	10,310 65	15,309 97
	Total	8,265 33	21,093 02	29,358 35
1885-'86—July 1st, 1885, to June 30th, 1886	Cincinnati	2,685 47	8,205 40	10,890 87
	Lexington	291 17	412 70	703 87
	Shelby	4,389 29	8,247 52	12,636 81
	Total	7,365 93	16,865 62	24,231 55
1886-'87—July 1st, 1886, to June 30th, 1887	Cincinnati	2,852 74	11,387 64	14,240 38
	Lexington	390 23	468 56	858 79
	Shelby	4,496 92	12,799 52	17,296 44
	Total	7,739 89	24,655 72	32,395 61
1887-'88—July 1st, 1887, to June 30th, 1888	Cincinnati	2,892 38	9,245 53	12,137 91
	Lexington	423 60	327 04	750 64
	Shelby	4,277 40	8,918 36	13,195 76
	Total	7,593 38	18,490 93	26,084 31
1888-'89—July 1st, 1888, to June 30th, 1889	Cincinnati	2,631 78	8,702 36	11,334 14
	Lexington	332 68	649 44	982 12
	Shelby	3,878 41	9,940 53	13,818 94
	Total	6,842 87	19,292 33	26,135 20
1889-'90—July 1st, 1889, to June 30th, 1890	Cincinnati	2,963 05	9,909 88	12,872 93
	Lexington	301 66	328 45	630 11
	Shelby	4,998 97	10,052 37	15,051 34
	Total	8,263 68	20,290 70	28,554 38
	Grand total	59,532 65	154,058 23	213,590 28

R. E. S. No. 1.

112 *Net Earnings Derived by L., C. & L. Div. on Passengers Coming from or over the C. & O. R. R., North. Div., Arrived at on Basis of Cost per Passenger per Mile, with the Passenger Proportion of All Expenses Included.*

Fiscal year.	Division.	Operating expenses, passenger.	Number of passengers carried one mile.	Cost per passenger per mile.	Number of passengers carried over one mile coming from & over C. & O., No. div.	Cost per passenger.	Cost of passenger from C. & O., Nor. div.	Revenue on passenger from C. & O., Nor. div.	Net revenue on passengers from C. & O., Nor. div.
1882-'83—Dec. 1, 1882, to June 30th, 1883	Cincinnati	172,696 59	7,688,926	.22460	59,078	.22460	1,326 89	1,691 58	364 69
	Lexington	81,352 11	3,445,323	.23612	7,455	.23612	176 03	200 38	24 35
	Shelby	13,376 97	536,753	.24922	98,403	.24922	2,452 40	2,864 84	412 44
							3,955 32	4,756 80	801 48
1883-'84—July 1st, 1883, to June 30, 1884	Cincinnati	302,138 57	16,792,398	.17992	141,355	.17992	2,543 26	3,912 41	1,369 15
	Lexington	136,592 14	7,896,382	.17298	18,651	.17298	322 63	530 61	207 98
	Shelby	24,658 47	1,039,941	.23711	221,231	.23711	5,245 60	6,153 43	907 83
							8,111 49	10,596 45	2,484 96
1884-'85—July 1st, 1884, to June 30th, 1885	Cincinnati	296,206 81	15,501,364	.19108	121,883	.19108	2,328 94	3,458 90	1,129 96
	Lexington	113,663 19	6,419,820	.17705	8,899	.17705	157 56	254 37	96 81
	Shelby	20,425 00	815,889	.25034	197,352	.25034	4,940 50	5,534 57	594 07
							7,427 00	9,247 84	1,820 84
1885-1886—July 1st, 1885, to June 30th, 1886	Cincinnati	281,366 22	13,713,266	.20520	135,457	.20520	2,779 58	3,200 17	420 59
	Lexington	109,155 20	6,672,155	.16360	16,042	.16360	262 45	359 73	97 28
	Shelby	20,446 45	856,755	.23865	210,530	.23865	5,024 30	4,914 62	Loss, 109 68
							8,066 33	8,474 52	408 19
1886-'87—July 1st, 1887, to June 30th, 1888	Cincinnati	297,011 56	15,025,148	.19767	119,669	.19767	2,365 58	3,297 67	932 09
	Lexington	114,504 21	6,772,159	.16908	16,746	.16908	283 13	446 95	163 82
	Shelby	21,714 96	904,579	.24005	182,856	.24005	4,389 46	5,081 51	692 05
							7,038 17	8,826 13	1,787 96
1887-'88—July 1st, 1887, to June 30th, 1888	Cincinnati	321,706 03	15,502,705	.20752	126,760	.20752	2,630 47	3,445 81	815 34
	Lexington	120,518 15	7,065,552	.17057	17,033	.17057	290 53	480 81	190 28
	Shelby	25,694 16	845,933	.30373	182,277	.30373	5,536 30	4,936 70	599 60
							8,457 30	8,863 32	406 02
1888-'89—July 1st, 1888, to June 30th, 1889	Cincinnati	376,304 05	16,998,551	.22137	118,582	.22137	2,625 05	3,154 11	529 06
	Lexington	112,098 28	6,877,184	.16300	14,934	.16300	243 42	383 17	139 75
	Shelby	24,212 25	744,340	.32528	176,247	.32528	5,732 96	4,650 65	Loss, 1,082 31
							8,601 43	8,187 93	Loss, 413 50
1889-'90—July 1st, 1889, to June 30th, 1890	Cincinnati	507,265 43	17,472,634	.29032	127,880	.29032	3,712 61	3,582 72	129 89
	Lexington	120,645 67	7,297,371	.16532	16,779	.16532	277 39	360 22	82 83
	Shelby	19,188 24	725,739	.26439	202,343	.26439	5,349 74	5,572 89	223 15
							9,339 74	9,515 83	176 09

113 *Net Earnings Derived by L., C. & L. R'y on Freight Coming from or over the C. & O., Northern Division, on Basis of Cost per Ton of Freight per Mile, with the Freight Proportion of All Expenses Included.*

Fiscal year.	Division.	Operating expenses, freight.	Number of tons of freight carried one mile.	Cost per ton per mile.	Number of tons of freight carried 1 mile coming from C. & O., N. D.	Cost per ton.	Cost of freight from C. & O., Nor. div.	Revenue on freight from C. & O., N. div.	Net revenue on freight from C. & O., Nor. div.
1882-'83—Dec. 1st, 1882, to June 30th, 1883	Cincinnati	287,422 91	24,317,034	1.1819	186,274	1.1819	2,201 57	6,091 21	3,889 64
	Lexington	61,729 58	5,084,345	1.2141	9,635	1.2141	116 98	247 16	130 18
	Shelby	17,450 45	555,177	3.1432	186,565	3.1432	5,864 11	6,874 88	1,010 77
							8,182 66	13,213 25	5,030 59
1883-'84—July 1st, 1883, to June 30th, 1884	Cincinnati	530,268 04	50,612,873	1.0477	402,614	1.0477	4,218 19	11,117 95	6,899 76
	Lexington	113,608 57	15,595,976	.7284	36,407	.7284	265 19	927 58	662 39
	Shelby	27,669 41	765,636	3.6139	327,308	3.6139	11,828 58	11,401 17	Loss, 427 41
							16,311 96	23,446 70	7,134 74
1884-'85—July 1st, 1884, to June 30, 1885	Cincinnati	524,190 64	57,217,258	.9161	328,546	.9161	3,009 81	10,413 52	7,403 71
	Lexington	115,743 08	18,554,420	.6238	48,249	.6238	300 98	988 72	687 74
	Shelby	26,176 97	783,994	3.3389	302,851	3.3389	10,111 89	11,321 65	1,209 76
							13,422 68	22,723 89	9,301 21
1885-'86—July 1st, 1885, to June 30th, 1886	Cincinnati	542,818 43	66,706,833	.8137	298,526	.8137	2,429 11	8,668 67	6,239 56
	Lexington	122,565 28	20,702,011	.5920	23,889	.5920	141 42	453 20	311 78
	Shelby	23,767 91	656,322	3.6214	270,855	3.6214	9,808 74	9,223 14	Loss, 585 60
							12,379 27	18,345 01	5,965 74
1886-'87—July 1st, 1886, to June 30th, 1887	Cincinnati	705,607 41	87,344,117	.8078	308,156	.8078	3,216 49	12,008 76	8,792 27
	Lexington	163,966 45	29,602,093	.5539	31,581	.5539	174 92	513 24	338 32
	Shelby	27,044 97	934,374	2.8944	394,826	2.8944	11,427 84	14,278 14	2,850 30
							14,819 25	26,800 14	11,980 89
1887-'88—July 1st, 1887, to June 30th, 1888	Cincinnati	796,917 48	101,165,897	.7880	369,137	.7880	2,908 80	9,919 94	7,011 14
	Lexington	171,862 62	28,703,928	.5987	17,484	.5987	104 67	355 04	250 37
	Shelby	25,689 98	779,918	3.2939	293,327	3.2939	9,661 96	10,329 12	667 22
							12,675 37	20,604 10	7,928 73
1888-'89—July 1st, 1888, to June 30, 1889	Cincinnati	843,386 09	104,355,484	.8082	329,594	.8082	2,663 71	9,277 90	6,614 19
	Lexington	148,868 41	26,662,549	.5583	31,723	.5583	177 12	694 89	517 77
	Shelby	40,823 21	700,875	5.8246	329,099	5.8246	19,168 70	11,373 75	Loss, 7,794 95
							22,009 53	21,346 54	Loss, 662 99
1889-'90—July 1st, 1889, to June 30th, 1890	Cincinnati	1,157,654 22	127,471,707	.9081	326,350	.9081	2,963 58	10,457 63	7,494 05
	Lexington	120,001 43	14,905,093	.8051	14,855	.8051	119 60	353 40	233 80
	Shelby	26,738 89	691,468	3.8669	338,173	3.8669	13,076 81	11,390 28	Loss, 1,686 53
							16,159 99	22,201 31	6,041 32

114 *Recapitulation.*

Net earnings derived by L., C. & L. R'y on passengers and freight coming from or over the C. & O., Northern div., arrived at on basis of cost per passenger per mile and cost of ton of freight per mile, with the passenger & freight proportion of all expenses included.

Fiscal year.	Divisions.	Passengers.	Freight.	
1882-'83—Dec. 1, 1882, to June 30th, '83	Cincinnati	364 69	3,889 64	4,254 33
	Lexington	24 35	130 18	154 53
	Shelby	412 44	1,010 77	1,423 21
	Total	801 48	5,030 59	5,832 07
1883-'84—July 1, 1883, to June 30th, 1884	Cincinnati	1,369 15	6,899 76	8,268 91
	Lexington	207 98	662 39	870 37
	Shelby	907 83	Loss, 427 41	480 42
	Total	2,484 96	7,134 74	9,619 70
1884-'85—July 1, '84, to June 30, '85	Cincinnati	1,129 96	7,403 71	8,533 67
	Lexington	96 81	687 74	784 55
	Shelby	594 07	1,209 76	1,803 83
	Total	1,820 84	9,301 21	11,122 05
1885-'86—July 1, '85, to June 30, '86	Cincinnati	420 59	6,239 56	6,660 15
	Lexington	97 28	311 78	409 06
	Shelby	Loss, 109 68	Loss, 585 60	695 28
	Total	408 19	5,965 74	6,373 93
1886-'87—July 1, '86, to June 30, '87	Cincinnati	932 09	8,792 27	9,724 36
	Lexington	163 82	338 32	502 14
	Shelby	692 05	2,850 30	3,542 35
	Total	1,787 96	11,980 89	13,768 85
1887-'88—July 1, '87, to June 30, '88	Cincinnati	815 34	7,011 14	7,826 48
	Lexington	190 28	250 37	440 65
	Shelby	Loss, 599 60	667 22	67 62
	Total	406 02	7,928 73	8,334 75
1888-'89—July 1, '88-June 30th, '89	Cincinnati	529 06	6,614 19	7,143 25
	Lexington	139 75	517 77	657 52
	Shelby	Loss, 1,082 31	Loss, 7,794 95	Loss, 8,877 26
	Total	413 50	Loss, 662 99	Loss, 1,076 49
1889-'90—July 1, '89-June 30th, '90	Cincinnati	129 89	7,494 05	7,364 16
	Lexington	82 83	233 80	316 63
	Shelby	223 15	Loss, 1,686 53	Loss, 1,463 38
	Total	176 09	6,041 30	6,217 41
	Grand total	7,472 04	52,720 23	60,192 27

R. E. S. No. 2.

115 *Net Earnings Derived by L., C. & L. R'y from Passengers Coming from or over the C. & O. R. R., Northern Div., Arrived at on Basis of Percentage that Operating Expenses Bear to Gross Earnings.*

Fiscal year.	Division.	Gross earnings.	Operating expenses.	Percentage of operating expenses to earnings.	Gross revenue from passengers coming from or over C. & O., North. div.	Percentage of operating expenses to earnings.	Cost of hauling passengers coming from or over C. & O., N. D.	Net revenue from passenger coming from or over C. & O., N. div.
1882-'83—Dec. 1st, 1882, to June 30th, 1883	Cincinnati	209,037 63	172,696 59	82.61	1,691 58	82.61	1,397 41	294 17
	Lexington	94,669 09	81,352 11	85.93	200 38	85.93	172 18	28 20
	Shelby	14,388 60	13,376 97	92.96	2,864 84	92.96	2,663 15	201 69
					4,756 80		4,232 74	524 06
1883-'84—July 1st, 1883, to June 30th, 1884	Cincinnati	433,216 16	302,138 57	69.74	3,912 41	69.74	2,728 51	1,183 90
	Lexington	199,649 69	136,592 14	68.42	530 61	68.42	363 04	167 57
	Shelby	27,257 47	24,658 47	90.46	6,153 43	90.46	5,566 39	587 04
					10,596 45		8,657 94	1,938 51
1884-'85—July 1st, 1884, to June 30th, '85	Cincinnati	401,324 48	296,206 81	73.81	3,458 90	73.81	2,553 01	905 89
	Lexington	173,070 38	113,663 19	65.67	254 37	65.67	167 04	87 33
	Shelby	25,362 91	20,425 00	80.53	5,534 57	80.53	4,456 99	1,077 58
					9,247 84		7,177 04	2,070 80
1885-'86—July 1st, 1885, to June 30th, 1886	Cincinnati	385,918 02	281,366 22	72.91	3,200 17	72.91	2,333 24	866 93
	Lexington	172,866 62	109,155 20	63.14	359 73	63.14	227 14	132 59
	Shelby	23,471 20	20,446 45	87.11	4,914 62	87.11	4,281 12	633 50
					8,474 52		6,841 50	1,633 02
1886-'87—July 1st, 1886, to June 30th, 1887	Cincinnati	404,564 80	297,011 56	73.41	3,297 67	73.41	2,420 82	876 85
	Lexington	173,052 88	114,504 21	66.17	446 95	66.17	295 74	151 21
	Shelby	25,477 73	21,714 96	85.23	5,081 51	85.23	4,330 97	750 54
					8,826 13		7,047 53	1,778 60
1887-'88—July 1st, 1887, to June 30th, 1888	Cincinnati	433,029 90	321,706 03	74.29	3,445 81	74.29	2,559 89	885 92
	Lexington	183,119 04	120,518 15	65.81	480 81	65.81	316 42	164 39
	Shelby	24,596 32	25,694 16	104.46	4,936 70	104.46	5,156 88	Loss, 220 18
					8,863 32		8,033 19	830 13
1888-'89—July 1st, 1888, to June 30th, 1889	Cincinnati	442,206 87	376,304 05	85.09	3,154 11	85.09	2,683 83	470 28
	Lexington	173,284 86	112,098 28	64.69	383 17	64.69	247 87	Loss, 135 30
	Shelby	18,615 78	24,212 25	130.06	4,650 65	130.06	6,048 63	1,397 98
					8,187 93		8,980 33	Loss, 792 40
1889-'90—July 1st, 1889, to June 30th, 1890	Cincinnati	479,560 08	507,265 43	105.77	5,682 72	105.77	3,789 44	206 72
	Lexington	198,621 69	120,645 67	60.74	360 22	60.74	218 80	141 42
	Shelby	20,881 20	19,188 24	91.89	5,572 89	91.89	5,120 93	451 96
					9,515 83		9,129 17	386 66

R. E. S. No. 3.

116 *Net Earnings Derived by L., C. & L. Div. from Freight Coming from or over the C. & O. R. R., Northern Div., Arrived at on Basis of Percentage that Operating Expenses Bear to Gross Earnings.*

Fiscal year.	Divisions.	Gross earnings.	Operating expenses.	Percentage of operating exp's to earnings.	Gross revenue from freight coming from or over C. & O., Northern div.	Percentage of operating expenses to earnings.	Cost of hauling freight coming from or over C. & O., Nor. div.	Net revenue from freight coming from or over C. & O., North. div.
1882-'83—Dec. 1st, 1882, to June 30th, 1883.....	Cincinnati	267,100 74	287,422 91	107.61	6,091 21	107.61	6,554 75	Loss, 463 54
	Lexington	86,853 77	61,729 58	71.07	247 16	71.07	175 65	71 51
	Shelby	21,986 06	17,450 45	79.37	6,874 88	79.37	5,456 59	1,418 29
					13,213 25		12,186 99	1,026 26
1883-'84—July 1st, 1883, to June 30th, 1884.....	Cincinnati	556,652 75	530,268 04	95.26	11,117 95	95.26	10,590 96	526 99
	Lexington	208,116 13	113,608 57	54.59	927 58	54.59	506 37	421 21
	Shelby	31,667 88	27,669 41	87.37	11,401 17	87.37	9,961 20	1,439 97
					23,446 70		21,058 53	2,388 17
1884-'85—July 1st, 1884, to June 30th, '85.....	Cincinnati	582,426 05	524,190 64	90.00	10,413 52	90.00	9,372 17	1,041 35
	Lexington	221,465 64	115,743 08	52.26	988 72	52.26	516 71	472 01
	Shelby	34,389 95	26,176 97	76.11	11,321 65	76.11	8,616 91	2,704 74
					22,723 89		18,505 79	4,218 10
1885-'86—July 1st, 1885, to June 30th, 1886.....	Cincinnati	633,902 86	542,818 43	85.63	8,668 67	85.63	7,423 98	1,244 69
	Lexington	225,573 28	122,565 28	54.34	453 20	54.34	246 27	206 93
	Shelby	27,993 26	23,767 91	84.91	9,223 14	84.91	7,831 36	1,391 78
					18,345 01		15,501 61	2,843 40
1886-'87—July 1st, 1886, to June 30th, 1887.....	Cincinnati	896,302 69	705,607 41	78.72	12,008 76	78.72	9,453 30	2,555 46
	Lexington	290,769 29	163,966 45	56.39	513 24	56.39	289 42	223 82
	Shelby	39,503 30	27,044 97	68.46	14,278 14	68.46	9,774 81	4,503 33
					26,800 14		19,517 53	7,282 61
1887-'88—July 1st, 1887, to June 30th, 1888.....	Cincinnati	1,111,145 51	796,917 48	71.72	9,919 94	71.72	7,114 58	2,805 36
	Lexington	289,847 25	171,862 62	63.69	355 04	63.69	226 12	128 92
	Shelby	31,545 84	25,689 98	81.43	10,329 12	81.43	8,411 00	1,918 12
					20,604 10		15,751 70	4,852 40
1888-'89—July 1st, 1888, to June 30th, 1889.....	Cincinnati	1,165,305 43	843,386 09	72.37	9,277 30	72.37	6,714 41	2,563 49
	Lexington	263,270 18	148,868 41	56.54	694 89	56.54	392 89	302 00
	Shelby	25,392 47	40,823 21	160.77	11,373 75	160.77	18,285 57	Loss, 6,911 82
					21,346 54		25,392 87	Loss, 4,046 33
1889-'90—July 1st, 1889, to June 30th, 1890.....	Cincinnati	1,268,214 38	1,157,654 22	91.28	10,457 63	91.28	9,545 72	911 91
	Lexington	188,399 88	120,001 43	63.29	353 40	63.69	225 08	128 32
	Shelby	24,989 51	26,738 89	107.00	11,390 28	107.00	12,187 60	797 32
					22,201 30		21,958 40	242 91

R. E. S. No. 3.

117 *Recapitulation.*

Net earnings derived by L., C. & L. R'y from passenger- and freight coming from or over the C. & O. R. R., Northern div., arrived at on basis of percentage operating expenses bear to gross earnings.

Fiscal year.	Divisions.	Passenger-.	Freight.	Total.
1882-'83—Dec. 1, 1882, to June 30th, '83	Cincinnati	294 17	Loss, 463 54	Loss, 169 37
	Lexington	28 20	71 51	99 71
	Shelby	201 69	1,418 29	1,619 98
	Total	524 06	1,026 26	1,550 32
1883-'84—July 1, '83, to June 30, '84	Cincinnati	1,183 90	526 99	1,710 89
	Lexington	167 57	421 21	588 78
	Shelby	587 04	1,439 97	2,027 01
	Total	1,938 51	2,388 17	4,326 68
1884-'85—July 1, '84, to June 30, '85	Cincinnati	905 89	1,041 35	1,947 24
	Lexington	87 33	472 01	559 34
	Shelby	1,077 58	2,704 74	3,782 32
	Total	2,070 80	4,218 10	6,288 90
1885-'86—July 1, '85, to June 30, '86	Cincinnati	866 93	1,244 69	2,111 62
	Lexington	132 59	206 93	339 52
	Shelby	633 50	1,391 78	2,025 28
	Total	1,633 02	2,843 40	4,476 42
1886-'87—July 1, '86, to June 30, '87	Cincinnati	876 85	2,555 46	3,432 31
	Lexington	151 21	223 82	375 03
	Shelby	750 54	4,503 33	5,253 87
	Total	1,778 60	7,282 61	9,061 21
1887-'88—July 1, '87, to June 30, '88	Cincinnati	885 92	2,805 36	3,691 28
	Lexington	164 39	128 92	293 31
	Shelby	Loss, 220 18	1,918 12	1,697 94
	Total	830 13	4,852 40	5,682 53
1888-'89—July 1, '88, to June 30, '89	Cincinnati	470 28	2,563 49	3,033 77
	Lexington	135 30	302 00	437 30
	Shelby	Loss, 1,397 98	Loss, 6,911 82	Loss, 8,309 80
	Total	Loss, 792 40	Loss, 4,046 33	Loss, 4,838 73
1889-'90—July 1, '89, to June 30, '90	Cincinnati	206 72	911 91	705 19
	Lexington	141 42	128 32	269 74
	Shelby	451 96	Loss, 797 32	345 36
	Total	386 66	242 91	629 57
	Grand total	8,369 39	18,807 52	27,176 90

R. E. S. No. 3.

118 At a court held for the court aforesaid on the 26th day of January, 1891—

Came plaintiff-, by counsel, and filed an amended petition herein. Said amended petition is in words and figures following, to wit:

Louisville Law & Equity Court.

ADOLPH L. SCHMIDT & Others, Plaintiffs,
vs.
THE LOUISVILLE, CINCINNATI AND LEXINGTON Railway Company, &c., Defendants.
} 1860. Amended Petition.

Plaintiffs amend their petition and say that since the bringing of this action all the semi-annual coupons on each of said two *thousand* and fifty (*250*) bonds mentioned in the petition up to and including the coupons falling due on the 1st of December, 1890, have accrued and fallen due, the coupons on each bond having matured and fallen due on the 1st of June and the first day of December of each year since the execution of said bonds. Each coupon is for thirty-five ($35) dollars. None of said coupons have been paid since the 1st of June, 1883, but they all remain wholly due and unpaid.

The said defendant railway company has refused to pay any part of them, claiming that they have no nett earnings from the business of said Cumberland & Ohio Railroad Company.

Wherefore plaintiffs continue to pray, as in their original petition, and that the nett earnings of the Louisville, Cincinnati
119 and Lexington Railway Company on business coming to it from or over the Cumberland & Ohio railroad, as directed in the order of reference herein of the 25th of February, 1890, and all said nett earnings as they may hereafter accrue be applied to the payment of all the coupons of said bonds now due and as hereafter fall due, and also to the payment of interest on said coupons from their respective maturities, and that any surplus nett earnings be set apart as a sinking fund for the payment of the bonds as they mature, and for all other proper equitable relief.

SIMRALL & BODLEY,
Att'ys for Pl'ffs.

ADOLPH L. SCHMIDT.

Subscribed and sworn to before me by Adolph L. Schmidt this 21st day of January, A. D. 1891.

THOS. R. SINTON,
Notary Public, J. C.

At a court held for the court aforesaid on the 3rd day of February, 1891—

Came Louisville, Cincinnati & Lexington Railway Co., by counsel, and filed exceptions to the report of R. E. Sewell herein—

And moved the court for leave to take evidence on notice to plaintiffs' attorneys in support of exceptions; to which plaintiffs object.

And plaintiffs move the court to confirm the commissioner's report herein.

120 And this action is assigned to 17th inst. for hearing.

Said exceptions are in words and figures following, to wit:

Louisville Law and Equity Court.

SCHMIDT, Plaintiff,
vs.
L., C. & L. R'Y Co., &c., Defendants. } 1860. Exceptions to Commissioner's Report.

The defendant railroad company excepts to the report of R. E. Sewell, treated as a commissioner's report and filed herein of January 20th, 1891, upon the following grounds, to wit:

1st. Because said report erroneously includes profits derived from the Shelbyville Railroad Company.

2nd. Because said report erroneously includes profits on business on the defendant's lines going to the lines of the Northern division of the Cumberland & Ohio Railroad Company.

3rd. Because in ascertaining the nett profits said report is upon an erroneous basis and should be based upon and guided by the amounts actually received for doing said business, from which should be deducted a reasonable share of the expenses incurred by the defendant railroad in doing said business.

4th. Because said report erroneously gives the plaintiffs a larger sum than they are entitled to in any aspect of the case.

BARNETT, MILLER & BARNETT.
Att'ys for Def't.

121 At a court held for the court aforesaid on the 17th day of February, 1891—

Came defendant railway company, by counsel, and filed additional exceptions to Sewell's report, and moved the court to set aside its order entered herein on the 3rd of February, 1891, overruling said defendants' motion for leave to take depositions in support of said defendants' exceptions, filed herein by consent as and for a commissioner's report, and thereupon moved the court for leave to take the depositions of said Sewell and J. W. Baird and other railroad expert accountants, and filed the affidavit of said Sewell and said Baird in support of said exceptions and of this motion, and moved the court to recommit said report, with directions to take such evidence as either party may offer as to the proper method of ascertaining net earnings.

Said additional exceptions are in word- and figures following, to wit:

Louisville Law and Equity Court.

A. L. SCHMIDT and Others, Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON Railroad Company and Others, Defendants.

Additional Exceptions to Sewell's Report.

The defendant railway company, for additional ground of exceptions to the report of R. E. Sewell, filed herein as and for a commissioner's report, is erroneous and illegal:

122 5. The order of reference herein is ambiguous and of doubtful construction, so much so, that the said commissioner, failing to construe it for himself, has adopted the construction put upon it by the plaintiff's counsel herein instead of construing the same for himself, in so far as the first view of the account is presented in said report.

6. In any event said order of reference is erroneous in excluding proper items of deduction, which should have been made from gross earnings in order to arrive at the net earnings of the traffic inquired about.

7. In no event should any account have been taken of earnings upon the line of the Shelby Railroad Company, because it was not in the contemplation of the parties of the contract that such earnings should be so appropriated and *the* cause the record shows that these same net earnings are claim*ing* by stockholders of the Shelby Railroad Company, who, in li*ti*gagation now and yet pending, are claiming said earnings upon the ground that the said lease of said Shelby Railroad line was illegal and void and railroad company operating the road should account to them for said net earnings, and said stockholders of the Shelby Railroad Company have not been made parties by the plaintiff to this case & are not parties and will be in nowise concluded by the judgment of the court rendered herein while they are so absent as defendants.

8. The said order of reference did not lay down the proper

123 principles which should have governed the commissioner in the application of the facts, and there was no proof in the record which justified the court in adopting the rules for the ascertainment of net profits which are contained in the said order of reference. The said order of reference should have directed the commissioner to make the usual and customary deductions from gross earnings as is the custom among railroad companies in the ascertainment of net earnings. Wherefore defendant asks that said report be quashed and set aside.

BARNETT, MILLER AND BARNETT,
Att'ys for R'y Co.

Said affidavit of R. E. Sewell is in words and figures following, to wit:

Louisville Law & Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILway Co., Defendants.
} Affidavit of R. E. Sewell.

R. E. Sewell says on oath that he made the report herein filed as the commissioner's report by consent January 20th, 1891. On being interrogated in reference thereto by counsel for defendant railway company, he says:

He has been railroad accountant in such matters since the year 1873 and now holds the position of auditor of disbursements of the Louisville & Nashville Railroad Company.

When the order of reference of February 25th, 1890, in this
124 case was brought to him for execution he was not sure that he understood its terms, and he applied to the counsel on both sides to explain and interpret the meaning of the order, and that the counsel for defendant railway company frankly said he was not able to understand it himself, and that he (Sewell) might go to Mr. Simrall, counsel for plaintiff, and that he had better adopt Mr. Simrall's construction of the order, and if that construction did not accord with his (Sewell's) opinion as a railroad accountant to make up a statement according to Mr. Simrall's construction of the order, and then present his own views in supplemental statements, so as to present every aspect of the matter that could be taken. Accordingly he has presented three views of the matter, view No. 1 being made in accordance with what he understood Mr. Simrall's construction of the order to require. He understood Mr. Simrall's construction of the order to mean that no expense was to be charged against handling this business, except that due solely to increased tonnage in trains—*i. e.*, a proportion of the expenses due to wear and tear on rolling stock and rails, and increased cost of water and fuel necessary for increased power required. He (Simrall) considered that all other expenses would have been equally as great if this business had not been handled—to illustrate, he (Simrall) held that the company had to pay their engineers, firemen, conductors, brakemen, and other employés whether this business was handled or not.

Accordingly aspect No. 1 was made up upon this basis,
125 allowing only expenses due to increased wear and tear on rolling stock and rails and increased cost of water and fuel necessary for increased power required. Affiant did not understand this to be the rule adopted by railroad companies in ascertaining the cost of handling passengers and freight.

He knows no way of ascertaining the net profits of hauling particular sets of passengers or special lots of freight by railroad companies as separated from their general business.

In his (affiant's) opinion, according to the true way of keeping such an account, aspect No. 1 of said report is erroneous for the reason that it *only* includes as expenses a proportion of wear and

tear on rolling stock and rails and a proportion of cost of water and fuel, while the correct way to have done it would have been to apply to this business the same rules as are applied generally and charge a proportion of all expenses, such as—

Advertising & soliciting—passenger.
Advertising & soliciting—freight.
Conductors, baggagemen, & brakemen—passenger.
Conductors & brakemen—freight.
Hire of engines & cars.
Injuries to employés—passenger.
Injuries to employés—freight.
Injuries to individuals—passenger.
Injuries to individuals—freight.
Loss & damage—baggage.
126 Loss & damage—freight.
Loss & damage—property.
Loss & damage, stock killed—passenger.
Loss & damage, stock killed—freight.
Removing wrecks.
Station agents and clerks—passenger.
Station agents and clerks—freight.
Station expenses.
Station labor.
Switchmen and watchmen.
Sleeping-car hire.
Sleeping-car expenses.
Train expenses—passenger.
Train expenses—freight.
Telegraph expenses.
Engine repairs.
Engineers' & firemen's wages.
Round-house expenses.
Oil & waste.
Water supply.
Fuel account.
Passenger-car repairs.
Freight-car repairs.
Sleeping-car repairs.
Repairs of track & roadway.
Renewal of cross-ties.
Renewal of rails.
127 Watchmen—road and bridge.
Bridge repairs.
Building repairs.
Telegraph repairs.
General office expenses, Louisville & New York.
Superintendence & general expenses.
Law expenses.
Stationary & printing.
Rent account.
Insurance.

Extraordinary expenses.
Taxes.
Improvements and additional facilities charged construction account.

Being asked which of the two aspects No. 2 or No. 3 was the nearest correct, he says that, in his opinion, aspect No. 2 is nearer correct than aspect No. 3, because he has approximated as nearly as possible the cost of handling passengers separate from the cost of handling freight and has applied the approximated cost per passenger per mile in ascertaining the cost of handling these passengers, and has applied the approximated cost per ton of freight per mile in ascertaining the cost of handling this freight, while in aspect No. 3 the percentage that the total expenses (passenger and freight) bears to the total gross earnings is applied to the gross earnings from these passengers and this freight to ascertain the cost of handling same.

128 In making up these statements, Nos. 1, 2, and 3, he took no notice and did not consider the evidence heretofore taken in this case, because the order of reference made no allusion to such evidence, and he therefore got his data from the company's books.

In making out view No. 1 he attempted to comply with the requirements of the order of reference, as interpreted and explained by plaintiff's counsel.

No account has been taken in either of these statements of the loss incurred to defendant in operating the Northern division of the Cumberland & Ohio Railroad Company proper (between Shelbyville and Bloomfield), which has been an annual loss of about ten thousand dollars.

While no exact rule can be given by which to determine the net earnings on the business coming to defendant over the Northern division of the Cumberland and Ohio Railroad Company, and any method is approximate only, in my opinion the best and most accurate method to determine said earnings is to treat all such business coming to defendant from and over the C. & O. R. R. Co. as so much of defendant's own business, and make it share its proportion of defendant's total expenditures. I have applied this general rule to aspects Nos. 2 and 3 of my report, and the difference in the results is because the basis for arriving at the cost of handling the passengers and freight from the Northern division of the C. & O. R. R. Co. *are* different, but in each case it is placed in the same footing of cost as the general business on the defendant's road.

129 This difference in the basis used to arrive at the cost is shown upon the face of the report No. 2 and has already been explained in this affidavit.

R. E. SEWELL.

Subscribed and sworn to before me by Robert E. Sewell this 14th day of February, 1891.

SHACKELFORD MILLER,
Notary Public, Jefferson County, Ky.

Said affidavit of J. W. Baird is in words and figures following, to wit:

Louisville Law and Equity Court.

SCHMIDT
vs.
L., C. & L. R'Y Co. } 1860.

J. W. Baird says on oath that he is a book-keeper and accountant, and that such has been his occupation for more than 30 years last past; that for the last 12 years he has been a railroad accountant, first as auditor for defendant herein, next the C., O. & S. W. R. R. and its successor, the Newport News and Mississippi Valley Co., and in that way has been called upon to acquaint himself with the method of ascertaining the net earnings arising from the operations of railroads as in use *in use* among railroads in this country; that the expression "net earnings" has a well-defined meaning among railroad accountants, and that while there are slight variations in the manner of keeping said accounts, the rule for ascertain-
130 ing such net earnings may be stated, in general terms, to be, first, ascertain what have been the gross earnings for a given period, as near as may be, and from this sum deduct all expenses incurred in producing them. He says that he has examined the report of R. E. Sewell filed in this action, and his affidavit to be filed, and concurs with him in his statement of the items which ought to be included in his deductions; he has also examined the three views presented by him in said report concerning the state of accounts between the parties, and has also examined the order of reference under which said report was made. Assuming the inter-*pu*-tation put upon the order of re*f*ference by said Sewell to be correct, then account # 1 would be correct, or as nearly so as such can be.

But he respectfully suggests that said order of re*f*ference inter-*-pu*-ted as aforesaid does not point out the true method of ascertaining "net earnings" in use among railroad accountants in this, that it does not require any deductions except for a very small part of the expenses incurred in producing them; he has also examined said report as to views # 2 and # 3, and is of the opinion that view # 2 presents the nearest approximation to the correct result upon the basis commonly in use among railroad accountants because it includes such items as are properly to be deducted from gross earnings, while # 3 seems to be based upon the percentage of operating expense to gross earnings of the whole line, which evidently are not a charge to the cost of handling the business from and over the C. & O. N. D. R. R.

131 View # 1 takes into account only such expenses *are* were due to increased traffic, and is therefore, in his humble judgment, erroneous; he also concurs with Mr. Sewell in the statement that there is no known method of ascertaining the actual cost of transporting particular sets of passengers and lots of freight separate from the general business of a railroad.

J. W. BAIRD.

Subscribed and sworn to before me by J. W. Baird this 17th day of February, 1891.

CON'F KREBS,
Notary Public, Jefferson County, Ky.

At a court held for the court aforesaid on the 19th day of February, 1891—

Came plaintiffs, by counsel, and filed two affidavits and two copies of judgments herein.

And to which defendants objected, and said objection being overruled, they excepted.

And this action, having been heard, was submitted on pending motions and exceptions, and the court, being advised, takes time.

Said affidavit of R. E. Sewell is in words and figures following, to wit:

Louisville Law and Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., &C., Defendants. } 1860.

132 The affiant, R. E. Sewell, says that as the auditor of the Louisville & Nashville Railroad Company he superintends all work of a similar kind of the Louisville, Cincinnati & Lexington Railway Company, defendant herein, and all like statements rendered herein heretofore by said defendant have been made under his superintendence. He says when Mr. Barnett sent him to see Judge Simrall as to making said report what said Simrall did was to furnish him with a copy of the order of court herein of the 25th of February, 1890, instructing the commissioner how to report. The said order was read to him, and he said he did not agree with that order as the proper way to make up the report. Judge Simrall said that was a matter of law with which the commissioner had nothing to do; that he wanted the report made up strictly in conformity with the instructions of the court; that the court had instructed him not to deduct from the gross earnings any costs or expenses which were necessarily incurred by said company, whether it had received and transacted said business or not, but should deduct the additional cost and expenses entailed upon the Louisville, Cincinnati & Lexington Railway Company by reason of business coming to it from or over the lines of the said Northern division of the Cumberland & Ohio road.

The instructions of the court to the commissioner contained this language: The said Louisville, Cincinnati & Lexington Railway Company having been fully equipped with officers, rolling
133 stock, and other appliances, and running at the time said contract was made, the commissioner will not deduct from said gross earnings any costs or expenses which were necessarily incurred by the said company, whether it had received and transacted said business or not.

Judge Simrall was of opinion that under said order no deduction could be made for such officers, rolling stock, or other appliances unless it could be shown that such additional officers, employees, rolling stock, and appliances were made necessary by this additional business. I agreed with him in this interpretation of that order and for that reason made no deduction in my*a* report No. 1; and it was necessary to assume that the trains would be run independent of this business, as the contrary could not be shown. I think my report No. 1, filed by me as the report of the commissioner, was made in conformity with the directions of the court, although I do not agree with it.

I do not see how any other deductions could have been made under the instructions of the court.

R. E. SEWELL.

Subscribed and sworn to before me by R. E. Sewell this 18th day of February, 1891.

H. H. GOEKE,
Notary Public, Jeff. Co., Ky.

At a court held for the court aforesaid on the 24th day of February, 1891—

This action, having been set at rules by plaintiff on 16th inst., is now remanded.

134 At a court held for the court aforesaid on the 9th day of March, 1891—

The court, being now advised, delivered a written opinion herein, which was ordered to be and now is filed and made part of the record.

Said opinion is in words and figures following, to wit:

L. L. & Eq. Court.

A. L. SCHMIDT ET AL.
vs.
LOUISVILLE, CIN. & LEX. R'WAY CO. ET AL.

The language of the mortgage is: "The first party (the L., C. & L. R'way) has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over s'd lines of the Northern division of the Cumberland & Ohio." This action is brought by the holders of the bonds or mortgage to have these profits, or rather net earnings mentioned in the mortgage, applied to the payment of the interest on said bonds as per contract and mortgage.

The case was referred to a commissioner, Mr. Sewell, the auditor of the defendant, by agreement, to ascertain and report the amount of such net earnings covered by the mortgage to which the plaintiffs as said bondholders are entitled. There are three questions presented: 1st. Are the pl'ffs entitled to the earnings both ways?

2nd. Are the pl'ffs entitled to the net earnings or busi-
135 ness both ways on the Shelby branch?

3rd. What is the true rule in determining the net earnings or profits to which plaintiffs are entitled?

I have considered these questions *contiously*, and have reached the conclusion that the net earnings pledged embrace such as arise from business carried on over said road both ways, going and coming.

Nor have I any doubt that the Shelbyville branch was & *sh'd* be considered a portion of the def't's line, and that its earnings are on lien under the mortgage in favor of plaintiffs. As to the third and last question, viz., What are the true and correct principa*ls* on which the net earnings in lien *sh'd* be ascertained? I have carefully examined the authorities cited by counsel and have given the subject my best thought, and my judgment is that in the order of Feb. 25th, 1890, the instructions thereon given to the *comms.*, upon *wh* the report herein excepted by him is based, were too restrictive. What are net earnings & the principles upon which they may be accurately ascertained are fully explained and elaborated in the following cases, which I have carefully examined: St. John *vs.* Erie R'y Co., 22 Wallace, 136; Union Pacific R. R. Co. *vs.* United States, 99 U. S., 420; Tapt *vs.* Railroad, 8 R. I., 310; Belfast & Moosehead Lake R. R. Co. *vs.* Belfast, 23 Amer. & Eng. R. R. Cases, 740; Bates *vs.* Androscoggin R. R. Co., 49 Me., 491; U. S. *vs.* Kansas P. R. Co., 9 Otto, 455; Pullan *vs.* C. & C. R. R. Co., 5 Bissell U. S. C. C., 237. These cases show that net earnings are the gross receipts less the expenses
of operating the road to earn such receipts—that is to
136 say, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. Where there are several roads or branch roads are operated under one management the net profit or net earnings of each road paid by it in dividends or to which it or its assignee is entitled is its *pro rata* of the difference between the gross receipts and disbursements of the system. The order of the 25th of Feb., 1890, ignored this equitable principle in defining the expenditures which should be estimated in arriving at the net earnings in lien in this case. In my opinion the statement made by the special commissioner, Sewell, marked R. E. S. No. 2, is made upon a correct principle, which includes proportion of *all* expenditures.

The exceptions of defendant to the report of the commissioner, Sewell, for estimating earnings both ways and for estimating earnings on the Shelby branch are overruled. Its exceptions *are* to the report, in so far as it conforms to the order of the 25th of Feb., 1890, erroneously stating the principle upon which the net earnings were to be estimated *is* sustained. Let an order of *re*reference be prepared in accordance with these views. The court will also sustain the def't's motion to set aside the order of the 3rd of Feb., 1891, overruling said def't's motion for leave to take depositions in support of defendant's exceptions, &c. (See motion.)

STERLING B. TONEY, *Judge.*

137 At a court held for the court aforesaid on the 19th day of March, 1891—

This action having been heard and submitted upon the defendant's exceptions filed herein on February 3rd, 1891, and its additional exceptions filed herein on February 17th, 1891, and also upon defendant's motions entered February 17th, 1891, to set aside the *orde* of February 3rd, 1891, overruling its motions to take depositions in support of its exceptions and to recommit said report so made by Sewell, with directions to the commissioner to take such evidence as either party may offer as to the proper method of ascertaining net earnings, and on plaintiffs' motion to confirm *confirm* said report, and the court, being sufficiently advised, delivered a written opinion, which is ordered to be filed as a part of this record.

It is further ordered that the defendant's third, fifth, sixth, and eighth exceptions to Sewell's report be, and they are now, for the present, sustained; to which the plaintiff, by counsel, excepts.

The defendant's first, second, fourth, and seventh exceptions to said report are hereby, for the present, overruled; to which order the defendant, by counsel, excepts.

It is further ordered that defendant's motion to set aside the order of February 3rd, 1891, which overruled its motion to take depositions in support of its said exceptions, be sustained, and said order is hereby set aside and held for naught, and the leave asked is

138 granted; to which the plaintiff excepts; and plaintiff's motion to confirm said report is overruled; to which plaintiffs except; and the case is again referred to the commissioner with directions to ascertain and report the net earnings to which bondholders referred to in the petition are entitled, derived by the Louisville, Cincinnati & Lexington Railway Company on business coming to it from or over the Cumberland & Ohio railroad (Northern division) on the basis of the princip*al* adopted by R. E. Sewell in the statement marked R. E. S. No. 2, returned and filed with his report; and the commissioner will examine and consider the books and papers of the Louisville, Cincinnati & Lexington Railway Company and all the evidence in this action and take and hear such further proof as may be offered or as may be proper, and he will also report, what items of expense he deducts from gross earnings and the amounts of these several items and how he arrived at the amounts, and, if they include expenses or any part thereof of any other road or company, what road or company and the items thereof and why they are included; to which modified order of reference the plaintiffs and defendants object and except.

At a court held for the court aforesaid on the 20th day of April, 1891—

Came Barnett, Miller and Barnett and filed a written notice in this action duly accepted.

And on their motion their names are stricken from the

139 record herein as attorneys for Louisville & Nashville Railroad Company.

Said notice is in words and figures following, to wit:

Louisville Law and Equity Court.

SCHMIDT, Plaintiff,
vs.
L., C. & L. R'Y Co., Defendant. } No. 1860. Notice.

The Louisville & Nashville Railroad Company will take notice that on Monday, April 20th, 1891, at the motion hour, we will move the court to strike our names from the record herein as attorneys for said railroad company.

BARNETT, MILLER & BARNETT.

Notice accepted.

HELM & BRUCE,
Att'ys for Def't.

At a court held for the court aforesaid on the 1st day of February, 1892—

Came R. E. Sewell, special commissioner, and filed his report herein, and said report is laid over one week for exceptions.

The following is the report of R. E. Sewell referred to and filed by the foregoing order:

140 Louisville Law and Equity Court.

A. L. SCHMIDT ET AL., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Co. and Others, Defendants.

Robert E. Sewell makes the foregoing and annexed report of the net earnings derived by the Louisville, Cincinnati & Lexington Railway Co. on passengers and freight coming from or over the Cumberland & Ohio railroad, Northern division, arrived at as per instructions of this court entered February 25th, 1890, which report is marked "R. E. S. No. 1."

The said Robert E. Sewell, having had considerable experience in making up statements of the operating expenses of railroads, suggested to the defendants' counsel that the statement marked "R. E. S. No. 1" was not, in his (R. E. Sewell's) opinion, correct, as he (Sewell) considered that all business handled owed its revenue entirely to the running of trains, and that for this reason all such business should bear its *pro rata* of *all expenses*. The defendants' counsel then requested the said R. E. Sewell to prepare statements, including a proportion of all expenses. In compliance with this request two statements were prepared. The annexed report, marked "R. E. S. No. 2," includes a proportion of *all* expenses, viz:

Advertising & soliciting—passenger.
Advertising & soliciting—freight.
Conductors, baggagemen, & brakemen—passenger.
Conductors & brakemen—freight.
Hire of engines and cars.
141 Injuries — employés—passenger.
Injuries to employés—freight.

Injuries to individuals—passenger.
Injuries to individuals—freight.
Loss & damage—baggage.
Loss & damage—freight.
Loss & damage—property.
Loss & damage, stock killed—passenger.
Loss & damage, stock killed—freight.
Removing wrecks.
Station agents and clerks—passenger.
Station agents and clerks—freight.
Station expenses.
Station labor.
Switchmen and watchmen.
Sleeping-car hire.
Sleeping-car expenses.
Train expenses—passenger.
Train expenses—freight.
Telegraph expenses.
Engine repairs.
Engineers' & firemen's wages.
Round-house expenses.
Oil & waste.
Water supply.
Fuel account.
Passenger-car repairs.
142 Freight-car repairs.
Sleeping-car repairs.
Repairs of track and roadway.
Renewel of cross-ties.
Renewel of rails.
Watchmen—road and bridge.
Bridge repairs.
Building repairs.
Telegraph repairs.
General office expenses, Louisville & New York.
Superintendence & general expenses.
Law expenses.
Stationery and printing.
Rent account.
Insurance.
Extraordinary expenses.
Taxes.

Improvements and additional facilities, charged to construction account.

The annexed statement marked "R. E. S. No. 3" includes a proportion of *all* expenses (as specified above in reference to statement marked "R. E. S. No. 2"), which proportion is in the same ratio to the earnings that the total expenses of the divisions of the L., C. & L. R'y over which this business passed bears to the total earnings of said divisions.

ROBERT E. SEWELL.

143 Said report filed February 1, 1892, and referred to on page 35, is in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

A. L. SCHMIDT ET AL.
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., ETC.

Report of R. E. Sewell, Special Commissioner.

In accordance with the directions of the court contained in its order of March 19th, 1891, I have prepared a statement of the net profits accruing to the L., C. & L. R'y Co. on basis of the principle adopted in report marked "R. E. S. No. 2."

The items of expense are more fully detailed in this statement, which is marked "R. E. S. No. 4," than they were in statement marked "R. E. S. No. 2."

This statement is made from June 1st, 1883, to June 30th, 1890, being a period of seven years and one month, and shows net profits aggregating $53,565.62.

The reason for embracing the period from June 1st, 1883, instead of from December 1st, 1882, is that the bondholders, other than the L. & N. R. R., do not claim there is any unpaid interest due them prior to that date.

Before making further reference to statement marked "R. E. S. No. 4," I wish to call attention to the fact that statement marked "R. E. S. No. 2" was made and submitted at the same time as was statement marked "R. E. S. No. 1," and that said statement

144 (R. E. S. No. 1) was made according to my understanding of instructions of the court entered February 25th, 1890, but I ventured to suggest that it was not made so as to include all items of expense due to transporting this traffic to and from the Northern division of the Cumberland & Ohio R. R., and I made the statement "R. E. S. No. 2" according to the *plan* ordered by the court, except that *all expenses* were included.

This explanation is made because I did not intend to offer an opinion as to whether or not earnings in both directions should be included, or as to whether or not the earnings over the Shelby R. R. should be included—*i. e.*, I did not attempt to construe the contract, but obeyed the order of the court as I understood it, only suggesting that, in order to arrive at net profits, all expenses should be included.

The order of March 19th, 1891, directs that commissioner to examine and consider the books and papers of the Louisville, Cincinnati & Lexington railway and all the evidence in this action, and take and hear such further proof as may be offered or as may be proper, and to report what items of expense he deducts from gross earnings and the amounts of the several items, and how he arrived at the amounts, and if they include expenses or any part thereof of aay other road or company, and the items thereof and why they are included.

The items of expenses and amounts thereof are shown in statement marked "R. E. S. No. 4" and are made up from pay-rolls and vouchers and reports of material used. A portion of the salaries of the general officers of the L. & N. R. R. Co., and also a
145 portion of the salaries of clerks in general officers' offices, and other expenses of the general offices of the L. & N. R. R. Co., are included—the proportion being in the same ratio as the gross earnings of the L., C. & L. R'y bear to the total gross earnings of all of the various properties included in the L. & N. R. R. Co.'s system. It is deemed right to include these expenses, which are incurred for the benefit of all lines in the L. & N. R. R. system, because when the L. & N. R. R. Co. purchased the L., C. & L. R'y the offices of president, board of directors, secretary & treasurer, auditor, general passenger & freight agent, and all of their clerks under the L., C. & L. R'y organization were dispensed with and the duties of these officers and employés have since been performed by the corresponding officer sand employés of the L. & N. R. R. Co., and in view of the largely increased business of the L., C. & L. R'y since it became a part of the L. & N. system of railroads, the amount charged as the L., C. & L. R'y Co.'s proportion of these expenses is much less than they could possibly have been had the old organization of the L., C. & L. R'y Co. been maintained and no portion of the salaries of the officers and employés of the L. & N. R. R. Co. been charged against the L., C. & L. R'y Co.

The order of reference dated March 19th, 1891, was so amended as to direct the special commissioner:

First. To ascertain and report whether the Northern division of the Cumberland & Ohio R. R. has since its completion earned
146 its operating expenses, and, if it has not, to report the deficit in this respect for each year.

There is a statement filed by Mr. Charles Haydon, assistant comptroller, marked "Exhibit Haydon No. 1," which is referred to in the said Haydon's deposition, which shows that the said road has not earned its operating expenses, but that the yearly deficit was as follows, viz:

Year.	Earnings.	Optg. exps.	Loss.
1880–1881	6,473.60	7,545.04	1,072.44
1881–1882	17,745.69	24,242.38	6,496.69
1882–1883	30,413.42	40,595.02	10,181.60
1883–1884	26,167.08	37,032.77	10,865.69
1884–1885	25,328.77	34,815.03	9,486.26
1885–1886	21,986.28	35,772.62	13,786.34
1886–1887	26,633.73	38,900.75	12,267.02
1887–1888	21,787.24	41,369.10	19,581.86
1888–1889	22,491.48	45,313.45	22,821.97
1889–1890	25,770.09	52,797.66	27,027.57
Total	$224,796.38	$358,383.82	$133,587.44

According to redistribution of earnings on basis of arbitrary of 40 miles allowed Northern div. of Cumb. & Ohio R. R. (this arbitrary is explained further on in this report), the loss in operating the said Northern div. of Cumb. & Ohio R. R. would have amounted to $93,511.77, as below:

147 Year.	Earnings.	Optg. exps.	Loss.
1880–1881	6,472.60	7,545.04	1,072.44
1881–1882	17,745.69	24,242.38	6,496.69
1882–1883	30,818.25	40,595.02	9,776.77
1883–1884	32,136.21	37,032.77	4,896.56
1884–1885	31,388.72	34,815.03	3,426.31
1885–1886	26,592.38	35,772.62	9,180.24
1886–1887	33,686.30	38,900.75	5,214.45
1887–1888	26,771.26	41,369.10	14,597.84
1888–1889	27,812.85	45,313.45	17,500.60
1889–1890	31,447.79	52,797.66	21,349.87
Total	$264,872.05	$358,383.82	$93,511.77

A similar redistribution of earnings on basis of an arbitrary of 60 miles allowed the Northern division of Cumb. & Ohio R. R. would make the loss in operating said property $71,083.73, as below:

Year.	Earnings.	Optg. exps.	Loss.
1880–1881	6,472.60	7,545.04	1,072.44
1881–1882	17,745.69	24,242.38	6,496.69
1882–1883	31,090.61	40,595.02	9,504.41
1883–1884	35,398.91	37,032.77	1,633.86
1884–1885	34,571.66	34,815.03	243.37
1885–1886	29,204.39	35,772.62	6,568.23
1886–1887	37,561.02	38,900.75	1,339.73
1887–1888	29,690.83	41,369.10	11,678.27
1888–1889	30,909.20	45,313.45	14,404.25
1889–1890	34,655.18	52,797.66	18,142.48
148 Total	$287,300.09	$358,383.82	$71,083.73

The earnings for the years 1880–'81, 1881–'82, and the first eleven months of 1882–'83 were not redistributed, as it would involve a great deal of clerical work, and no settlement is involved for that time.

Second. To ascertain and report whether the earnings as between the L., C. & L. R'y Co. and the Northern division of the Cumberland & Ohio R. R. have been properly distributed, and if there has been any error in this respect to report wherein the error consists.

The deposition of Edward Rowland, auditor of receipts of the L. & N. R. R. Co., has been taken, and he explains how these earnings have been distributed. His deposition is made a part of this report. He states that the earnings have been distributed on a mileage basis. Depositions are also filed with this report from three eminent men in railroad-traffic matters, viz., Mr. W. H. McDoel, gen. m'g'r of the L., N., A. & C. R'y; Mr. M. H. Smith, pres. L. & N. R. R. Co., and Mr. Albert Fink, late commissioner of Trunk Line Railroad Association.

The testimony of all these gentlemen shows that the distribution of earnings has not been made according to the usual custom in cases of this kind, which custom is to allow a branch line an arbitrary rate or arbitrary mileage exceeding the actual mileage of the branch line. Their statements are *quite* full and explicit.

Mr. Fink says it has been a practice with the trunk lines to allow the branch lines 100 miles for any distance less than 50 miles.

149 Mr. Fink in his reply to Q. 13 says:

"I principally go by the length of the haul in this case, and I find that the haul on the C. & O. is about twenty miles in round figures, and the haul on the main line, L. & N. div'n and Shelby R. R., is about forty-one. I would say that to allow the C. & O. at least as much mileage as the other—say forty miles, or double haul, in order to make it simpler—on what they actually did—I think that would be as little as they could do, and they could be more liberal if they wanted to be, and it would not be anything out of the way."

The earnings have been twice redistributed under the supervision of Mr. Edward Rowland, auditor of receipts, L. & N. R. R., first allowing forty miles arbitrary to the Northern division of Cumb. & Ohio R. R., as suggested by Mr. Fink, and the result to the Northern div. Cumb. & Ohio R. R. of said redistribution is shown on page 4 of this report, and the result of the net earnings accruing to the L., C. & L. R'y by this redistribution is shown in statements filed herewith, marked "R. E. S. 6" and "R. E. S. No. 7," presenting two views of expenses.

The other redistribution is by allowing the Northern div. of Cumberland & Ohio R. R. an arbitrary of 60 miles, and the result of this to the Northern div. of Cumb. & Ohio R. R. is shown on page 5 of this report, and the result to the net earnings accruing to the L., C. & L. R'y by this redistribution is shown in statements filed herewith, marked R. E. S. No. 8 and R. E. S. No. 9, presenting two views of expenses.

150 Referring to what Mr. Fink says in regard to trunk lines allowing 100 miles, I would call attention to the fact that 40 miles is the lowest arbitrary he mentions, and says he does not think he would be quite satisfied with it. The larger the arbitrary mileage allowed the Cumb. & Ohio R. R., Northern div., the

greater the revenue that accrues to said road, which is represented by a corresponding decrease in the revenue accruing to the L., C. & L. R'y and Shelby R. R.

If we had adopted 100 miles, according to the custom of trunk lines, as stated by Mr. Fink, it would have further materially increased the earnings accruing to the Northern div. of Cumb. & Ohio R. R. and materially reduce the earnings accruing to the L., C. & L. R'y and Shelby R. R., as forty miles arbitrary is the minimum suggested by Mr. Fink, and 100 miles the maximum referred to by him, but not recommended. I have compiled the statements referred to on basis of 40 and 60 miles arbitraries.

Third. The commissioner is further directed that in showing the net profits on the lines of the Louisville, Cincinnati & Lexington R'y and the Shelby R. R. that he must show separately the profits accruing to the L., C. & L. R'y and Shelby R. R. from freight and passengers coming from or over the Northern div. of Cumb. & Ohio R. R. and the profits accruing to the L., C. & L. R'y and Shelby R. R. on freight and passengers going to the C. & O., Northern div., from or over either the Shelby R. R. or the L., C. & L. R'y.

The statements marked "R. E. S. 4," "R. E. S. No. 5," "R. E. S. No. 6," "R. E. S. No. 7," "R. E S. No. 8," and "R. E. S. No. 9" are so prepared as to give this information.

151 The depositions of Messrs. McDoel, Smith, and Fink all show that they consider that the plan adopted in statement marked "R. E. S. No. 2," and also in statement marked "R. E. S. No. 4," fixed the expense of transporting this traffic over the L., C. & L. R'y at figures that were below the actual cost.

Mr. Fink, in his answer to Q. 25, says he thinks the cost would run up to three or four cents per ton per mile, and in answer to Q. 18 he says that "it is a most difficult matter to come at in estimating the cost of local work. I have worked at that very faithfully for many years, and you have simply to take the condition of the business of each road; you can only approximate it, etc." I call attention to the fact that I have in my depositions stated that it was impossible to get at the cost of handling any particular freight business; that all the statements furnished by me are only approximates, but as I understood that I was required to show figures on which my approximates are based, I did the best I could, and in my deposition, made about April 10th, 1889, I stated that it would cost more to handle this business than the average business of the L., C. & L. R'y; this was in answer to Q. 8 of said deposition. I have therefore prepared statements, estimating the cost of this work at 3 cents per ton per mile, in accordance with Mr. Fink's views.

The following statements are submitted:

R. E. S. No. 4—With the Earnings and Expenses as Ordered by the Court March 19th, 1891.

152	R. E. S. No. 4 (continued).—Showing profits accruing on L., C. & L. R'y and Shelby R. R. on business coming from Northern div. of the Cumb. & Ohio R. R. amounting to.....	$29,713.64
	And on business going to Northern div. of Cumb. & Ohio R. R. amounting to.....	23,851.98
	Total profits.....	$53,565.62
	R. E. S. No. 5.—The earnings being based on actual mileage and expenses, estimated at 3c. per ton per mile on L., C. & L. R'y, showing a loss on L., C. & — R'y and Shelby R. R. on business coming from Northern division Cumberland & Ohio R. R. amounting to.....	$13,992.45
	And showing a profit on business going to the said Northern div. C. & O. R. R. of	9,036.97
	Net loss	$4,955.48
	R. E. S. No. 6.—The earnings being arrived at by allowing the Northern div. of Cumb. & Ohio R. R. an arbitrary of 40 miles and the expenses the same as in statement marked "R. E. S. No. 4," showing profits accruing on the L., C. & L. R'y and Shelby R. R. on business coming from Northern div'n of the Cumb. & Ohio R. R. amounting to	$5,115.43
	And going to the Northern div. C. & O. R. R.....	8,374.52
	Total profit.....	13,489.93
	R. E. S. No. 7.—The earnings being arrived at by allowing the arbitrary of 40 miles to Cumb. & Ohio, Northern div., and estimating the expenses at 3c. per ton per mile on L., C. & L. R'y, showing a loss on the L., C. & L. R'y and Shelby R. R. on business coming from the Northern div. of Cumb. & Ohio R. R. amounting to	$38,590.66
	And going to the Northern div. C. & O. R. R.....	6,440.49
	Total loss.....	$45,031.15

153 R. E. S. No. 8.—The earnings being arrived at by allowing the Northern div. Cumb. & Ohio R. R. an arbitrary of 60 miles and the expenses the same as in statement marked "R. E. S. No. 4," showing a loss on the L., C. & L. R'y and Shelby R. R. on business coming from the Northern div. of Cumb. & Ohio R. R. amounting to $8,332.27
And going to the Northern div. C. & O. R. R..... 605.82

Total loss..... $8,938.09

R. E. S. No. 9.—The earnings being arrived at by allowing the arbitrary — 60 miles to Northern div. Cumb. & Ohio R. R. and estimating the expenses at 3c. per ton per mile on the L., C. & L. R'y, showing a loss on the L., C. & L. R'y and Shelby R. R. on business coming from the Northern div. of Cumb. & Ohio R. R. amounting to $52,038.36
And going to the Northern div. C. & O. R. R..... 15,420.83

Total loss..... $67,459.19

The expenses on Shelby railroad are the same in all of these statements.

The distribution of passenger earnings in statement marked "R. E. S. No. 4" was regarded as correct, and it is the same in all of these statements.

The asterisks on the statements referred to above indicate loss.

While I do not understand that interest on the bonded indebtedness of the L., C. & L. R'y Co. should be included in the cost of hauling this business over said L., C. & L. R'y, and while it is not estimated in any of the before-mentioned statements, it may be of interest to the court to be advised in regard to it.

154 I therefore submit a statement, marked "R. E. S. No. 10," showing amount of said interest on bonded indebtedness that would be chargeable against the traffic to and from the Northern division of Cumberland & Ohio R. R., arrived at by ascertaining the average amount of interest chargeable to carrying one passenger one mile over the L., C. & L. R'y and the average amount of interest chargeable to carrying one ton of freight on- mile over the L., C. & L. R'y and applying the average cost per passenger mile to the number of passengers carried one mile over the L., C. & L. R'y going to or coming from the Northern division of the Cumberland and Ohio R. R. and by applying the average of interest per ton of freight per mile to the number of tons of freight carried one mile over the L., C. & L. R'y either going to or coming from the Northern div. Cumberland & Ohio R. R.

The amount found to be chargeable to passengers and freight coming from the Northern div. of the Cumberland & Ohio R. R. is	$10,853.68
And the amount chargeable to similar traffic going to Northern div. Cumb. & Ohio R. R. is found to be	5,369.54
Total	$16,223.22

If this interest had been considered in compiling statements marked "R. E. S. No. 4" to "R. E. S. No. 9," inclusive, the net results of said statements would have been as follows:

155 R. E. S. No. 4 would have shown a net profit on traffic coming from the Northern div. C. & O. R. R. of	$18,859.96
And on traffic going to the Northern division of Cumb. & Ohio R. R.	18,482.44
Total profit	$37,342.40
R. E. S. No. 5 would have shown a loss on traffic coming from the Northern div. Cumb. & Ohio R. R. of	$24,846.13
And a profit *in* traffic going to the Northern div. Cumb. & Ohio R. R. of	3,667.43
Net loss	$21,178.70
R. E. S. No. 6 would have shown a loss on traffic coming from the Northern div. Cumb. & Ohio R. R. of	$5,738.25
And a profit on traffic *going* to said Northern div. of Cumb. & Ohio R. R. of	3,004.98
Net loss	$2,733.27
R. E. S. No. 7 would have shown a loss on traffic coming from the Northern div. Cumb. & Ohio R. R. of	$49,444.34
And going to said Northern div. C. & O. R. R.	11,810.03
Total loss	$61,254.37
R. E. S. No. 8 would have shown a loss on traffic coming from the Northern div. Cumb. & Ohio R. R. of	$19,185.95
And going to said Northern div. C. & O. R. R.	5,975.36
Total loss	$25,161.31
156 R. E. S. No. 9 would have shown a loss on traffic coming from the Northern div. of Cumb. & Ohio R. R. of	$62,892.04
And going to said Northern div. C. & O. R. R.	20,790.37
Total loss	$85,682.41

R. E. SEWELL,
Special Commissioner.

Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for the month — June *30*, 1883—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	966 23	.0880	4 17	4 06	8 23
2	Engineers, firemen, conductors, brakemen, etc.	3,325 12	.3027	14 36	13 97	28 33
3	Hire of engines and cars	461 56	.0420	1 99	1 94	3 93
4	Employees killed or injured	37 50	.0034	16	16	32
5	Individuals killed or injured					
6	Loss or damage to					
7	Damage to property					
8	Stock killed or injured	98 75	.0090	43	42	85
9	Expense at stations	2,354 07	.2143	10 17	9 89	20 06
10	Locomotive repairs	1,539 09	.1401	6 65	6 47	13 12
11	Round-house expenses	577 34	.0526	2 50	2 43	4 93
12	Supplies for locomotives	3,321 19	.3034	14 39	14 00	28 39
13	Telegraph expenses and repairs	572 60	.0521	2 47	2 40	4 89
14	Sleeping-car hire	681 33	.0620	2 94	2 86	5 80
15	Sleeping-car expenses	163 73	.0140	66	65	1 31
16	Train expenses	578 07	.0526	2 50	2 43	4 93
17	Car repairs—pass., bag., & express.	1,100 67	.1002	4 75	4 63	9 38
18	Sleeping-car repairs					
19	Repairs of roadway	4,388 10	.3995	18 95	18 44	37 39
20	Repairs of bridges and trestles	365 42	.0333	1 58	1 54	3 12
21	Repairs of buildings	336 84	.0306	1 45	1 41	2 86
22	Superintendence & gen. expense	301 73	.0275	1 30	1 27	2 57
23	Law expenses	114 19	.0104	49	48	97
24	Stationery and printing	320 61	.0292	1 39	1 35	2 74
25	Rent account	1,539 54	.1401	6 65	6 47	13 12
26	Extraordinary expenses	108 42	.0099	47	45	92
27	Insurance					
28	Construction account	647 43	.0589	2 79	2 72	5 51
29	Taxes	984 88	.0897	4 26	4 14	8 40
30	— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	1,407 48	.1281	6 08	5 91	11 99
		26,291 89	2.3936	113 55	110 49	224 04

Total cost of carrying passengers on Cincinnati div., $26,291.89, divided by 1,098,419, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.3936 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passenger coming from or over Nor. div. of the C. & O. R. R.	4,744	2.3936	113 55	146 86	33 31
Passenger going to or over Nor. div. of the C. & O. R. R	4,616	2.3936	110 49	126 59	16 08
Total	9,360		224 04	273 43	49 39

158 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for month of June, 1883—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	234 16	.0070	3 70	30	4 00
2	Engineers, firemen, conductors, brakemen, etc.	5,158 50	.1485	78 49	6 27	84 76
3	Hire of engines and cars	524 94	.0151	7 98	64	8 62
4	Employees killed or injured	596 00	.0172	9 09	73	9 82
5	Individuals killed or injured	20 00	.0006	32	03	35
6	Loss or damage to	306 08	.0088	4 65	37	5 02
7	Damage to property					
8	Stock killed or injured	98 75	.0028	1 48	12	1 60
9	Expense at stations	9,481 33	.2730	144 29	11 54	155 83
10	Locomotive repairs	2,071 25	.0596	31 50	2 52	34 02
11	Round-house expenses	776 97	.0223	11 78	94	12 72
12	Supplies for locomotives	4,469 55	.1287	68 02	5 44	73 46
13	Telegraph expenses and repairs	770 59	.0222	11 73	94	12 67
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	847 03	.0244	12 89	1 03	13 92
17	Car repairs	1,971 24	.0567	29 97	2 40	32 37
18	Sleeping-car repairs					
19	Repairs of roadway	5,905 37	.1700	89 85	7 19	97 04
20	Repairs of bridges and trestles	491 76	.0142	7 50	60	8 10
21	Repairs of buildings	453 32	.0130	6 87	55	7 42
22	Superintendence and general expense	406 06	.0117	6 18	49	6 67
23	Law expenses	153 67	.0044	2 32	19	2 51
24	Stationery and printing	431 48	.0124	6 55	52	7 07
25	Rent account	2,373 89	.0683	36 10	2 89	38 99
26	Extraordinary expenses	145 92	.0042	2 22	18	2 40
27	Insurance					
28	Construction account	871 30	.0251	13 28	1 06	14 34
29	Taxes	1,325 20	.0382	20 19	1 62	21 81
30	Freight proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	1,894 15	.0545	28 80	2 30	31 10
		41,787 51	1.2029	635 75	50 86	686 61

Total cost of carrying freight on Cincinnati div'n, $41,787.51, divided by 3,473,862, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 1.2029 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	52,852	1.2029	635 75	1,227 50	591 75
Freight going to or over Nor. div. of the C. & O. R. R.	4,228	1.2029	50 86	221 44	170 58
Total	57,080		686 61	1,448 94	762 33

159 Net earnings derived by Lexington branch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for month of June, 1883—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Operating expenses.	Average cost per passenger per mile.	Cost of carrying passenger— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	194 13	.0394	36	26	62
2	Engineers, firemen, conductors, brakemen, etc.	1,436 88	.2919	2 67	1 97	4 64
3	Hire of engines and cars	51 90	.0105	10	07	17
4	Employees killed or injured					
5	Individuals killed or injured					
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	95 29	.0194	18	13	31
9	Expense at stations	415 44	.0844	77	57	1 34
10	Locomotive repairs	691 23	.1404	1 28	95	2 23
11	Round-house expenses	236 72	.0481	44	32	76
12	Supplies for locomotives	1,427 07	.2899	2 65	1 96	4 61
13	Telegraph expenses and repairs	240 20	.0488	45	33	78
14	Sleeping-car hire	136 68	.0278	25	19	44
15	Sleeping-car expenses	102 62	.0208	19	14	33
16	Train expenses	184 33	.0375	34	25	59
17	Car repairs—pass., bag., & express.	515 17	.1047	96	71	1 67
18	Sleeping-car repairs					
19	Repairs of roadway	4,686 90	.9523	8 69	6 43	15 12
20	Repairs of bridges and trestles	37 81	.0077	07	05	12
21	Repairs of buildings	110 15	.0224	20	15	35
22	Superintendence & gen. expense	200 38	.0407	37	27	64
23	Law expenses	357 09	.0726	66	49	1 15
24	Stationery and printing	48 13	.0098	09	07	16
25	Rent account	8 06	.0017	02	01	03
26	Extraordinary expenses					
27	Insurance					
28	Construction account					
29	Taxes	551 75	.1121	1 02	76	1 78
30	Passenger proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	722 24	.1466	1 34	99	2 33
		12,450 17	2.5295	23 10	17 07	40 17

Total cost of carrying passengers on Lexington branch, $12,450.17, divided by 492,189, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.5295 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Coming from or over Nor. div. of the C. & O. R. R.	913	2.5295	23 10	30 56	7 46
Going to or over Nor. div. of the C. & O. R. R.	675	2.5295	17 07	20 27	3 20
Total	1,588		40 17	50 83	10 66

160 Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for month of June, 1883—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	108 28	.0149	13	08	21
2	Engineers, firemen, conductors, brakemen, etc	1,180 59	.1625	1 37	84	2 21
3	Hire of engines and cars	5 70	.0008	01	.....	01
4	Employees killed or injured					
5	Individuals killed or injured	150	.0207	17	11	28
6	Loss or damage to freight	27 79	.0038	03	02	05
7	Damage to property					
8	Stock killed or injured	30 30	.0042	04	02	06
9	Expense at stations	1,290 46	.1777	1 50	92	2 42
10	Locomotive repairs	423 66	.0583	49	30	79
11	Round-house expenses	145 09	.0199	17	10	27
12	Supplies for locomotives	874 65	.1204	1 01	62	1 63
13	Telegraph expenses and repairs	131 09	.0181	15	09	24
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	200 73	.0276	23	14	37
17	Car repairs, freight	479 38	.0660	56	34	90
18	Sleeping-car repairs					
19	Repairs of roadway	2,072 62	.3955	3 33	2 04	5 37
20	Repairs of bridges and trestles	23 18	.0032	03	02	05
21	Repairs of buildings	67 52	.0093	08	05	13
22	Superintendence and general expense	122 81	.0169	14	09	23
23	Law expenses	218 87	.0301	25	15	40
24	Stationery and printing	29 51	.0041	03	02	05
25	Rent account	4 94	.0007	01	.....	01
26	Extraordinary expenses					
27	Insurance					
28	Construction account	338 17	.0466	39	24	63
29	Taxes					
30	Freight proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	442 67	.0609	51	32	83
		9,168 01	1.2622	10 63	6 51	17 14

Total cost of carrying freight on Lexington branch, $9,168.01, divided by 726,335, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 1.2622 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	842	1.2622	10 63	21 31	10 68
Freight going to or over Nor. div. of the C. & O. R. R.	516	1.2622	6 51	16 85	10 34
Total	1,358	.....	17 14	38 16	21 02

161 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for month of June, 1883—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Cost of carrying passengers— Going to or over Nor. division, C. & O. R. R.	Cost of carrying passengers— Total both directions.
1	Advertising and soliciting	181 70	.2370	17 61	14 74	32 35
2	Engineers, firemen, conductors, brakemen, etc	154 28	.2012	14 95	12 51	27 46
3	Hire of engines and cars					
4	Employees killed or injured					
5	Individuals killed or injured					
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	1 42	.0018	13	11	24
9	Expense at stations	38 43	.0501	3 72	3 12	6 84
10	Locomotive repairs	100 08	.1305	9 69	8 12	17 81
11	Round-house expenses	24 02	.0313	2 33	1 95	4 28
12	Supplies for locomotives	157 30	.2052	15 24	12 76	28
13	Telegraph expenses and repairs	50 10	.0653	4 85	4 06	8 91
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	26 42	.0345	2 56	2 15	4 71
17	Car repairs—pass., bag., & express	80 70	.1053	7 82	6 55	14 37
18	Sleeping-car repairs					
19	Repairs of roadway	478 96	.6246	46 40	38 84	85 24
20	Repairs of bridges and trestles	16 61	.0217	1 61	1 35	2 96
21	Repairs of buildings	55 55	.0724	5 38	4 50	9 88
22	Superintendence & gen. expense	21 20	.0277	2 06	1 72	3 78
23	Law expenses	25 77	.0336	2 50	2 09	4 59
24	Stationery and printing	3 61	.0047	35	29	64
25	Rent account	515 21	.6719	49 92	41 78	91 90
26	Extraordinary expenses					
27	Insurance					
28	Construction account					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby R. R. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	57 09	.0744	5 53	4 63	10 16
		1,988 45	2.5932	192 65	161 27	353 92

Total cost of carrying passengers on Shelby R. R., $1,988.45, divided by 76,679, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.5932 cents.

Recapitulation.

	Number passenger-carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R	7,429	2.5932	192 65	228 67	36 02
Passengers going to or over Nor. div. of the C. & O. R. R.	6,219	2.5932	161 27	181 59	20 32
Total	13,648		353 92	410 26	56 34

162 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for month — June, 1883—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting					
2	Engineers, firemen, conductors, brakemen, etc	178 45	.2250	35 21	13 26	48 47
3	Hire of engines and cars	153 68	.1938	30 33	11 42	41 75
4	Employees killed or injured					
5	Individuals killed or injured					
6	Loss or damage to	5 07	.0064	1 00	38	1 38
7	Damage to property					
8	Stock killed or injured	1 43	.0018	28	10	38
9	Expense at stations	102 42	.1291	20 20	7 61	27 81
10	Locomotive repairs	143 90	.1814	28 39	10 69	39 08
11	Round-house expenses	34 67	.0437	6 84	2 58	9 42
12	Supplies for locomotives	226 20	.2852	44 63	16 81	61 44
13	Telegraph expenses and repairs	72 05	.0910	14 24	5 36	19 60
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	20 90	.0264	4 13	1 55	5 68
17	Car repairs	47 61	.0600	9 39	3 54	12 93
18	Sleeping-car repairs					
19	Repairs of roadway	688 68	.8683	135 88	51 17	187 05
20	Repairs of bridges and trestles	23 89	.0301	4 71	1 77	6 48
21	Repairs of buildings	79 87	.1007	15 76	5 93	21 69
22	Superintendence & gen. expense	30 48	.0384	6 01	2 26	8 27
23	Law expenses	37 06	.0467	7 31	2 75	10 06
24	Stationery and printing	5 20	.0066	1 03	39	1 42
25	Rent account	740 79	.9340	146 16	55 04	201 20
26	Extraordinary expenses					
27	Insurance					
28	Construction account					
29	Taxes					
30	— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	82 09	.1035	16 20	6 10	22 30
		2,674 44	3.3721	527 70	198 71	726 41

Total cost of carrying freight on Shelby R. R., $2,674.44, divided by 79,311, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 3.3721 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	15,649	3.3721	527 70	449 91	*77 79
Freight going to or over Nor. div. of the C. & O. R. R.	5,893	3.3721	198 71	292 36	93 65
Total	21,542		726 41	742 27	15 86

* Loss.

163 Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1884—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	10,514 12	.6626	56 69	31 80	88 49
2	Engineers, firemen, conductors, brakemen, etc	37,264 53	.2219	200 95	112 72	313 67
3	Hire of engines and cars	3,722 52	.0222	20 10	11 28	31 38
4	Employees killed or injured	2,133 60	.0127	11 50	6 45	17 95
5	Individuals killed or injured	535 67	.0032	2 90	1 62	4 52
6	Loss or damage to baggage	52 92	.0003	27	15	42
7	Damage to property					
8	Stock killed or injured	1,877 16	.0112	10 14	5 69	15 83
9	Expense at stations	26,529 38	.1580	143 08	82 26	223 34
10	Locomotive repairs	14,177 55	.0844	76 43	42 87	119 30
11	Round-house expenses	6,361 21	.0379	34 32	19 25	53 57
12	Supplies for locomotives	30,217 63	.1799	162 92	91 38	254 30
13	Telegraph expenses and repairs	7,133 23	.0425	38 49	21 59	60 08
14	Sleeping-car hire	7,701 84	.0459	41 57	23 31	64 88
15	Sleeping-car expenses	1,935 40	.0115	10 42	5 84	16 26
16	Train expenses	7,298 73	.0435	39 39	22 10	61 49
17	Car repairs—pass., bag., & express	15,551 97	.0926	83 87	47 03	130 90
18	Sleeping-car repairs	1,041 47	.0062	5 61	3 15	8 76
19	Repairs of roadway	45,077 01	.2684	243 07	136 33	379 40
20	Repairs of bridges and trestles	4,198 47	.0250	22 64	12 70	35 34
21	Repairs of buildings	2,960 84	.0176	15 94	8 94	24 88
22	Superintendence & gen. expense	3,584 00	.0213	19 29	10 82	30 11
23	Law expenses	2,327 85	.0139	12 59	7 06	19 65
24	Stationery and printing	4,337 32	.0258	23 36	13 11	36 47
25	Rent account	18,916 33	.1127	102 07	57 24	159 31
26	Extraordinary expenses	8,909 89	.0530	48 00	26 92	74 92
27	Insurance					
28	Construction account	10,628 60	.0633	57 32	32 15	89 47
29	Taxes	11,768 40	.0701	63 48	35 61	99 09
30	—— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	15,380 87	.0916	82 95	46 53	129 48
		302,138 57	1.7992	1,629 36	913 90	2,543 26

Total cost of carrying passengers on Cincinnati div., $302,138.57, divided by 16,792,398, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.7992 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Coming from or over Nor. div. of the C. & O. R. R.	90,560	1.7992	1,629 36	2,494 29	864 93
Going to or over Nor. div. of the C. & O. R. R.	50,795	1.7992	913 90	1,418 12	504 22
Total	141,355		2,543 26	3,912 41	1,369 15

164 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June, 1884—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	4,482 20	.0089	28 59	7 24	35 83
2	Engineers, firemen, conductors, brakemen, etc.	72,258 87	.1428	458 64	116 29	574 93
3	Hire of engines and cars	3,371 31	.0067	21 52	5 46	26 98
4	Employees killed or injured	2,757 32	.0055	17 66	4 48	22 14
5	Individuals killed or injured	112 00	.0002	64	17	81
6	Loss or damage to freight	3,267 95	.0063	20 23	5 13	25 36
7	Damage to property					
8	Stock killed or injured	1,985 16	.0039	12 53	3 17	15 70
9	Expense at stations	129,894 50	.2567	824 47	209 04	1,033 51
10	Locomotive repairs	23,656 55	.0467	149 99	38 03	188 02
11	Round-house expenses	9,559 33	.0191	61 35	15 55	76 90
12	Supplies for locomotives	47,998 88	.0949	304 80	77 28	382 08
13	Telegraph expenses and repairs	8,678 02	.0170	54 60	13 85	68 45
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	14,194 19	.0281	90 25	22 89	113 14
17	Car repairs	42,068 77	.0831	266 90	67 67	334 57
18	Sleeping-car repairs					
19	Repairs of roadway	54,839 01	.1084	348 16	88 27	436 43
20	Repairs of bridges and trestles	5,107 72	.0101	32 44	8 22	40 66
21	Repairs of buildings	3,602 04	.0071	22 80	5 79	28 59
22	Superintendence & gen'l expense	6,236 18	.0123	39 51	10 01	49 52
23	Law expenses	2,831 98	.0056	17 99	4 56	22 55
24	Stationery and printing	5,276 63	.0104	33 40	8 47	41 87
25	Rent account	32,029 10	.0633	203 31	51 55	254 86
26	Extraordinary expenses	10,839 43	.0214	68 73	17 43	86 16
27	Insurance					
28	Construction account	12,931 66	.0256	82 22	20 85	103 07
29	Taxes	14,318 54	.0283	90 89	23 05	113 94
30	— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	17,870 70	.0353	113 38	28 74	142 12
		530,268 04	1.0477	3.365 00	853 19	4,218 19

Total cost of carrying freight on Cincinnati div., $530,268.04, divided by 50,612,873, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 1.0477 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	321,180	1.0477	3,365 00	7,859 35	4,494 35
Freight going to or over Nor. div. of the C. & O. R. R.	81,434	1.0477	853 19	3,258 60	2,405 41
Total	402,614		4,218 19	11,117 95	6,899 76

165 Net earnings derived by Lexington branch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1884—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,360 07	.0299	3 23	2 31	5 54
2	Engineers, firemen, conductors, brakemen, etc.	17,742 66	.2247	24 24	17 40	41 64
3	Hire of engines and cars	1,950 09	.0247	2 66	1 91	4 57
4	Employees killed or injured	147 36	.0019	21	15	36
5	Individuals killed or injured	312 95	.0040	43	31	74
6	Loss or damage to baggage	12 65	.0002	02	02	04
7	Damage to property					
8	Stock killed or injured	1,566 49	.0198	2 14	1 53	3 67
9	Expense at stations	5,919 35	.0750	8 09	5 80	13 89
10	Locomotive repairs	6,854 82	.0868	9 36	6 72	16 08
11	Round-house expenses	2,805 70	.0355	3 83	2 75	6 58
12	Supplies for locomotives	13,811 82	.1749	18 87	13 54	32 41
13	Telegraph expenses and repairs	2,753 63	.0348	3 75	2 69	6 44
14	Sleeping-car hire	1,443 18	.0183	1 97	1 42	3 39
15	Sleeping-car expenses	363 60	.0046	50	36	86
16	Train expenses	2,534 06	.0321	3 46	2 49	5 95
17	Car repairs—pass., bag., & express.	7,597 49	.0962	10 38	7 45	17 83
18	Sleeping-car repairs	195 65	.0025	27	19	46
19	Repairs of roadway	42,336 50	.5361	57 84	41 52	99 36
20	Repairs of bridges and trestles	1,734 80	.0220	2 37	1 70	4 07
21	Repairs of buildings	1,829 42	.0231	2 49	1 79	4 28
22	Superintendence & gen. expense	1,591 53	.0201	2 17	1 56	3 73
23	Law expenses	754 19	.0096	1 04	74	1 78
24	Stationery and printing	1,481 74	.0188	2 03	1 46	3 49
25	Rent account	621 23	.0079	85	61	1 46
26	Extraordinary expenses	588 95	.0074	80	57	1 37
27	Insurance					
28	Construction account	2,677 37	.0339	3 66	2 63	6 29
29	Taxes	7,564 41	.0958	10 34	7 42	17 76
30	Passenger proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	7,040 93	.0892	9 62	6 91	16 53
		136,592 14	1.7298	186 62	133 95	320 57

Total cost of carrying passengers on Lexington branch, $136,592.14, divided by 7,896,382, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.7298 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passenger- coming from or over Nor. div. of the C. & O. R. R.	10,789	1.7298	186 62	310 32	123 70
Passenger- going to or over Nor. div. of the C. & O. R. R.	7,744	1.7298	133 95	220 29	86 34
Total	18,533		320 59	530 61	210 04

166 Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1884 - arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	1,741 04	.0112	3 20	88	4 08
2	Engineers, firemen, conductors, brakemen, etc.	16,029 60	.1028	29 28	8 15	37 43
3	Hire of engines and cars	324 83	.0021	59	17	76
4	Employees killed or injured	1,189 45	.0076	2 17	60	2 77
5	Individuals killed or injured					
6	Loss or damage to freight	519 17	.0033	94	26	1 20
7	Damage to property					
8	Stock killed or injured	787 61	.0051	1 45	41	1 86
9	Expense at stations	16,040 12	.1029	29 29	8 17	37 46
10	Locomotive repairs	5,319 69	.0341	9 70	2 71	12 41
11	Round-house expenses	2,050 06	.0132	3 76	1 05	4 81
12	Supplies for locomotives	10,344 30	.0663	18 87	5 27	24 14
13	Telegraph expenses and repairs	1,633 09	.0105	2 99	83	3 82
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	3,707 43	.0238	6 77	1 89	8 66
17	Car repairs	12,143 15	.0779	22 17	6 19	28 36
18	Sleeping-car repairs					
19	Repairs of roadway	25,108 42	.1610	45 83	12 78	58 61
20	Repairs of bridges and trestles	1,028 86	.0066	1 87	53	2 40
21	Repairs of buildings	1,084 97	.0067	1 91	53	2 44
22	Superintendence & gen. expense	2,345 10	.0150	4 27	1 19	5 46
23	Law expenses	447 28	.0029	83	23	1 06
24	Stationery and printing	878 77	.0056	1 59	45	2 04
25	Rent account	58 70	.0004	12	03	15
26	Extraordinary expenses	349 28	.0022	62	18	80
27	Insurance					
28	Construction account	1,588 00	.0102	2 90	81	3 71
29	Taxes	4,486 59	.0288	8 20	2 29	10 49
30	— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	4,403 06	.0282	8 03	2 24	10 27
		113,608 57	.7284	207 35	57 84	265 19

Total cost of carrying freight on Lexington branch, $113,608.57, divided by 15,595,975, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .7284 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	28,467	.7284	207 35	706 87	499 52
Freight going to or over Nor. div. of the C. & O. R. R.	7,940	.7284	57 84	220 71	162 87
Total	36,407		265 19	927 58	662 39

167 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for the year ended June 30, 1884—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	14 87	.0014	2 00	1 10	3 10
2	Engineers, firemen, conductors, brakemen, etc	1,748 08	.1681	240 16	131 73	371 89
3	Hire of engines and cars	2,084 43	.2004	286 31	157 03	443 34
4	Employees killed or injured	31 35	.0030	4 29	2 35	6 64
5	Individuals killed or injured					
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	264 72	.0255	36 43	19 98	56 41
9	Expense at stations	593 60	.0571	81 58	44 74	126 32
10	Locomotive repairs	757 94	.0729	104 15	57 13	161 28
11	Round-house expenses	288 14	.0277	39 57	21 71	61 28
12	Supplies for locomotives	1,342 21	.1291	184 44	101 17	285 61
13	Telegraph expenses and repairs	647 37	.0623	89 01	48 81	137 82
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	351 39	.0338	48 29	26 49	74 78
17	Car repairs—pass., bag., & express.	997 83	.0959	137 02	75 14	212 16
18	Sleeping-car repairs					
19	Repairs of roadway	5,886 03	.5660	808 65	443 52	1,252 17
20	Repairs of bridges and trestles	139 53	.0134	19 14	10 50	29 64
21	Repairs of buildings	506 77	.0487	69 58	38 16	107 74
22	Superintendence & gen. expense	232 68	.0224	32 00	17 56	49 56
23	Law expenses	381 07	.0366	52 29	28 68	80 97
24	Stationery and printing	142 59	.0137	19 57	10 74	30 31
25	Rent account	7,117 37	.6844	977 81	536 29	1,514 10
26	Extraordinary expenses	110 56	.0106	15 14	8 31	23 45
27	Insurance					
28	Construction account					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby railroad of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	1,019 94	.0981	140 16	76 87	217 03
		24,658 47	2.3711	3,387 59	1,858 01	5,245 60

Total cost of carrying passengers on Shelby R. R., $24,658.47, divided by 1,039,941, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.3711 cents.

Recapitulation.

	Number passenger-carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
— coming from or over Nor. div. of the C. & O. R. R.	142,870	2.3711	3,387 59	3,926 90	539 31
— going to or over Nor. div. of the C. & O. R.R.	78,361	2.3711	1,858 01	2,226 53	368 52
Total	221,231		5,245 60	6,153 43	907 83

168 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for the year ended June 30, 1884—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Operating expenses, freight.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,169 09	.2833	618 32	308 96	927 28
2	Engineers, firemen, conductors, brakemen, etc	1,705 15	.2227	486 06	242 89	728 93
3	Hire of engines and cars	33 85	.0044	9 60	4 80	14 40
4	Employees killed or injured					
5	Individuals killed or injured	88 33	.0115	25 10	12 54	37 64
6	Loss or damage to —					
7	Damage to prio-erty	264 85	.0346	75 52	37 73	113 25
8	Stock killed or injured	1,319 72	.1724	376 28	188 01	564 29
9	Expense at stations	847 18	.1107	241 61	120 73	362 34
10	Locomotive repairs	322 07	.0421	91 89	45 91	137 80
11	Round-house expenses	1,500 25	.1959	427 57	213 64	641 21
12	Supplies for locomotives	723 59	.0945	206 25	103 06	309 31
13	Telegraph expenses and repairs					
14	Sleeping car hire					
15	Sleeping-car expenses	352 47	.0460	100 40	50 17	150 57
16	Train expenses	861 65	.1125	245 54	122 69	368 23
17	Car repairs					
18	Sleeping-car repairs	6,579 31	.8593	1,875 49	937 13	2,812 62
19	Repairs of roadway	155 96	.0204	44 52	22 25	66 77
20	Repairs of bridges & trestles	566 44	.0740	161 51	80 70	242 21
21	Repairs of buildings	375 15	.0490	106 95	53 44	160 29
22	Superintendence & general expense	425 94	.0557	121 57	60 74	182 31
23	Law expenses	159 39	.0208	45 40	22 68	68 08
24	Stationery and printing	7,955 41	1.0391	2,267 92	1,133 21	3,401 13
25	Rent account	123 57	.0161	35 14	17 56	52 70
26	Extraordinary expenses					
27	Insurance					
28	Construction account					
29	Taxes					
30	Freight proportion on basis of earnings charged to Shelby R. R. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	1,140 04	.1489	324 98	162 39	487 37
		27,669 41	3.6139	7,887 62	3,941 21	11,828 83

Total cost of carrying freight on Shelby R. R., $27,669.41, divided by 765,636, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 3.6139 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	218,258	3.6139	7,887 62	7,116 75	*770 87
Freight going to or over Nor. div. of the C. & O. R. R.	109,057	3.6139	3,941 21	4,284 42	343 21
Total	327,315	.....	11,828 83	11,401 17	*427 66

*Loss.

169 Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1885—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	15,439 57	.0996	95 56	52 44	148 00
2	Engineers, firemen, conductors, brakemen, etc.	39,637 15	.2557	245 34	134 63	379 97
3	Hire of engines and cars	2,567 51	.0166	15 93	8 74	24 67
4	Employees killed or injured	2,577 73	.0166	15 93	8 74	24 67
5	Individuals killed or injured	608 53	.0039	3 74	2 05	5 79
6	Loss or damage to baggage	96 10	.0006	58	32	90
7	Damage to property					
8	Stock killed or injured	3,315 19	.0214	20 53	11 26	31 79
9	Expense at stations	24,557 22	.1584	151 98	83 40	235 38
10	Locomotive repairs	13,409 98	.0865	82 99	45 54	128 53
11	Round-house expenses	6,809 91	.0440	42 22	23 17	65 39
12	Supplies for locomotives	26,418 57	.1704	163 49	89 72	253 21
13	Telegraph expenses and repairs	6,709 52	.0392	37 61	20 64	58 25
14	Sleeping-car hire	8,700 15	.0561	53 83	29 54	83 37
15	Sleeping-car expenses	2,052 74	.0133	12 76	7 00	19 76
16	Train expenses	6,622 06	.0427	40 97	22 48	63 45
17	Car repairs—pass., bag., & express.	14,625 97	.0944	90 57	49 70	140 27
18	Sleeping-car repairs	187 40	.0012	1 15	63	1 78
19	Repairs of roadway	42,616 28	.2749	263 76	144 74	408 50
20	Repairs of bridges and trestles	3,039 34	.0196	18 81	10 32	29 13
21	Repairs of buildings	3,868 55	.0250	23 99	13 16	37 15
22	Superintendence & gen. expense	4,100 07	.0265	25 43	13 95	39 38
23	Law expenses	3,644 24	.0235	22 55	12 37	34 92
24	Stationery and printing	4,257 92	.0275	26 39	14 48	40 87
25	Rent account	18,846 24	.1215	116 58	63 97	180 55
26	Extraordinary expenses	10,615 98	.0685	65 72	36 07	101 79
27	Insurance	133 98	.0008	77	42	1 19
28	Construction account	5,043 74	.0325	31 18	17 11	48 29
29	Taxes	11,100 65	.0716	68 70	37 70	106 40
30	Passenger proportion on basis of earnings charged to Cincinnati division of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	15,234 52	.0983	94 31	51 76	146 07
		296,206 81	1.9108	1,833 37	1,006 05	2,839 42

Total cost of carrying passengers on Cincinnati div'n, $296,206.81, divided by 15,501,364, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.9108 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passenger- coming from or over Nor. div. of the C. & O. R. R.	95,948	1.9108	1,833 37	1,946 03	112 66
Passenger- going to or over Nor. div. of the C. & O. R. R.	52,651	1.9108	1,006 05	1,512 87	506 82
Total	148,599		2,439 42	3,458 90	619 48

170 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for the year ended June 30, 1885—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	4,529 61	.0079	19 86	6 10	25 96
2	Engineers, firemen, conductors, brakemen, etc	71,211 70	.1245	312 99	96 06	409 05
3	Hire of engines and cars	2,102 13	.0037	9 31	2 86	12 17
4	Employees killed or injured	4,026 49	.0071	17 86	5 48	23 34
5	Individuals killed or injured	115 70	.0002	50	16	66
6	Loss or damage to freight	8,561 12	.0150	37 72	11 57	49 29
7	Damage to property					
8	Stock killed or injured	1,961 34	.0034	8 56	2 62	11 18
9	Expense at stations	128,770 34	.2251	565 87	173 68	739 55
10	Locomotive repairs	24,661 65	.0431	108 34	33 26	141 60
11	Round-house expenses	9,491 04	.0166	41 73	12 81	54 54
12	Supplies for locomotives	48,536 96	.0848	213 17	65 43	278 60
13	Telegraph expenses and repairs	7,547 01	.0132	33 19	10 18	43 37
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	11,780 25	.0206	51 79	15 89	67 68
17	Car repairs, freight	35,567 08	.0622	156 36	47 99	204 35
18	Sleeping-car repairs					
19	Repairs of roadway	52,903 13	.0925	232 53	71 37	303 90
20	Repairs of bridges and trestles	3,772 99	.0066	16 59	5 09	21 68
21	Repairs of buildings	4,802 33	.0083	20 87	6 40	27 27
22	Superintendence & gen. expense	7,241 01	.0126	31 67	9 72	41 39
23	Law expenses	4,523 90	.0079	19 85	6 10	25 95
24	Stationery and printing	5,285 72	.0092	23 13	7 10	30 23
25	Rent account	35,550 86	.0621	156 10	47 92	204 02
26	Extraordinary expenses	13,178 50	.0230	57 82	17 74	75 56
27	Insurance	166 31	.0003	75	23	98
28	Construction account	6,260 29	.0109	27 40	8 41	35 81
29	Taxes	13,778 15	.0241	60 58	18 60	79 18
30	Freight proportion on basis of earnings charged to Cincinnati divs. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	17,865 03	.0312	78 43	24 07	102 50
		524,190 64	.9161	2,302 97	706 84	3,009 81

Total cost of carrying freight on Cincinnati div., $524,190.64, divided by 57,217,258, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .9161 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	251,388	.9161	2,302 97	6,882 77	4,579 80
Freight going to or over Nor. div. of the C. & O. R. R.	77,158	.9161	706 84	3,530 75	2,823 91
Total	328,546		3,009 81	10,413 52	7,403 71

171 Net earnings derived by Lexington branch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1885—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,904 07	.0452	1 62	2 46	4 08
2	Engineers, firemen, conductors, brakemen, etc	15,547 86	.2422	8 67	13 19	21 86
3	Hire of engines and cars	2,144 14	.0334	1 20	1 82	3 02
4	Employees killed or injured	131 65	.0021	08	11	19
5	Individuals killed or injured	42 38	.0006	02	03	05
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	1,758 50	.0274	98	1 49	2 47
9	Expense at stations	6,375 52	.0995	3 56	5 42	8 98
10	Locomotive repairs	5,700 75	.0888	3 18	4 84	8 02
11	Round-house expenses	2,462 36	.0384	1 37	2 09	3 46
12	Supplies for locomotives	9,884 33	.1539	5 51	8 38	13 89
13	Telegraph expenses and repairs	2,595 87	.0403	1 44	2 20	3 64
14	Sleeping-car hire	1,972 59	.0307	1 10	1 67	2 77
15	Sleeping-car expenses	465 42	.0072	26	39	65
16	Train expenses	2,178 14	.0339	1 21	1 85	3 06
17	Car repairs—pass., bag., & express	6,540 33	.1019	3 64	5 55	9 19
18	Sleeping-car repairs	42 49	.0007	03	04	07
19	Repairs of roadway	30,722 85	.4786	17 12	26 07	3 19
20	Repairs of bridges and trestles	472 01	.0074	26	40	66
21	Repairs of buildings	2,704 58	.0421	1 51	2 29	3 80
22	Superintendence & gen. expense	1,807 34	.0282	1 01	1 54	2 55
23	Law expenses	905 85	.0141	50	77	1 27
24	Stationery and printing	1,259 83	.0196	70	1 07	1 77
25	Rent account	289 61	.0045	16	25	41
26	Extraordinary expenses	12 98	.0002	01	01	02
27	Insurance					
28	Construction account	1,227 39	.0191	68	1 04	1 72
29	Taxes	6,783 88	.1057	3 78	5 76	9 54
30	Passenger proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	6,730 47	.1048	3 75	5 71	9 46
		113,663 19	1.7705	63 35	96 44	159 79

Total cost of carrying passenger- on Lexington branch, $113,663.19, divided by 6,419,820, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.7705 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Coming from or over Nor. div. of the C. & O. R. R.	3,578	1.7705	63 35	100 67	37 32
Going to or over Nor. div. of the C. & O. R. R.	5,447	1.7705	96 44	153 70	57 26
Total	9,025		159 79	254 37	94 58

172 Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1885—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	1,886 15	.0102	4 08	84	4 92
2	Engineers, firemen, conductors, brakemen, etc.	17,595 07	.0949	37 96	7 83	45 79
3	Hire of engines and cars	225 62	.0012	48	10	58
4	Employees killed or injured	1,001 83	.0054	2 15	45	2 60
5	Individuals killed or injured	6 25				
6	Loss or damage to freight	317 55	.0017	68	14	82
7	Damage to property					
8	Stock killed or injured	897 99	.0048	1 91	40	2 31
9	Expense at stations	16,594 39	.0895	35 79	7 39	43 18
10	Locomotive repairs	5,420 58	.0292	11 68	2 41	14 09
11	Round-house expenses	2,147 15	.0115	4 60	95	5 55
12	Supplies for locomotives	13,973 67	.0753	30 12	6 22	36 34
13	Telegraph expenses and repairs	1,802 72	.0097	3 88	80	4 68
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	3,687 62	.0199	7 96	1 64	9 60
17	Car repairs, freight	11,924 93	.0643	25 72	5 31	31 03
18	Sleeping-car repairs					
19	Repairs of roadway	21,335 81	.1149	45 96	9 49	55 45
20	Repairs of bridges and trestles	327 79	.0018	72	15	87
21	Repairs of buildings	1,878 22	.0101	4 04	83	4 87
22	Superintendence & gen'l expense	2,826 09	.0152	6 08	1 25	7 33
23	Law expenses	629 08	.0034	1 36	28	1 64
24	Stationery and printing	874 91	.0047	1 88	39	2 27
25	Rent account	166 39	.0009	36	07	43
26	Extraordinary expenses	9 02	.0001	04	01	05
27	Insurance					
28	Construction account	852 22	.0046	1 84	38	2 22
29	Taxes	4,710 32	.0254	10 15	2 10	12 25
30	— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	4,651 71	.0251	10 04	2 07	12 11
		115,743 08	.6238	249 48	51 50	300 98

Total cost of carrying freight on Lexington branch, $115,743.08, divided by 18,554,420, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .6238 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	39,993	.6238	249 48	750 57	501 09
Freight going to or over Nor. div. of the C. & O. R. R.	8,256	.6238	51 50	238 15	186 65
Total	48,249	.....	300 98	988 72	687 74

173 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1885—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	23 95	.0029	4 49	2 47	6 96
2	Engineers, firemen, conductors, brakemen, etc.	1,667 57	.2044	316 58	174 15	490 73
3	Hire of engines and cars	1,094 90	.1342	207 85	114 34	322 19
4	Employees killed or injured	34 20	.0042	6 51	3 58	10 09
5	Individuals killed or injured					
6	Loss or damage to baggage	1 35	.0001	15	09	24
7	Damage to property					
8	Stock killed or injured	481 33	.0590	91 38	50 27	141 65
9	Expense at stations	683 93	.0838	129 79	71 40	201 19
10	Locomotive repairs	566 37	.0695	107 64	59 22	166 86
11	Round-house expenses	124 61	.0153	23 70	13 04	36 74
12	Supplies for locomotives	941 64	.1154	178 74	98 32	277 06
13	Telegraph expenses and repairs	602 68	.0739	114 46	62 96	177 42
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	267 21	.0328	50 80	27 95	78 75
17	Car repairs	827 43	.1014	157 05	86 39	243 44
18	Sleeping-car repairs					
19	Repairs of roadway	5,015 80	.6148	752 22	523 82	1,476 04
20	Repairs of bridges and trestles	102 06	.0125	19 36	10 65	30 01
21	Repairs of buildings	95 45	.0117	18 12	9 97	28 09
22	Superintendence & gen. expense	188 65	.0231	35 78	19 68	55 46
23	Law expenses	85 20	.0104	16 11	8 86	24 97
24	Stationery and printing	149 66	.0183	28 34	15 59	43 93
25	Rent account	6,622 64	.8117	1,257 19	691 59	1,948 78
26	Extraordinary expenses	138 59	.0170	26 33	14 48	40 81
27	Insurance					
28	Construction account					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby *railroad* of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	709 78	.0870	134 75	74 13	208 88
		20,425 00	2.5034	3,877 34	2,132 95	6,010 29

Total cost of carrying passengers on Shelby R. R., $20,425.00, divided by 815,889, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.5034 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	154,883	2.5034	3,877 34	3,115 55	*761 79
Passengers going to or over Nor. div. of the C. & O. R. R	85,202	2.5034	2,132 95	2,419 02	286 07
Total	240,085		6,010 29	5,534 57	*475 72

* Loss.

174 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1885—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting					
2	Engineers, firemen, conductors, brakemen, etc.	2,101 20	.2681	504 32	307 62	811 94
3	Hire of engines and cars	1,269 96	.1620	304 74	185 88	490 62
4	Employees killed or injured	95 80	.0122	22 95	14 00	36 95
5	Individuals killed or injured	620 67	.0792	148 98	90 88	239 86
6	Loss or damage to freight	86 08	.0108	20 32	12 39	32 71
7	Damage to property					
8	Stock killed or injured	307 87	.0393	73 93	45 09	119 02
9	Expense at stations	1,254 40	.1600	300 97	183 59	484 56
10	Locomotive repairs	722 60	.0921	173 24	105 68	278 92
11	Round-house expenses	158 97	.0203	38 19	23 29	61 48
12	Supplies for locomotives	1,201 37	.1532	288 18	145 79	463 97
13	Telegraph expenses and repairs	768 92	.0981	184 54	112 56	297 10
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	199 94	.0256	48 16	29 37	77 53
17	Car repairs	667 39	.0851	160 07	97 65	257 72
18	Sleeping-car repairs					
19	Repairs of roadway	6,397 77	.8160	1,534 97	936 30	2,471 27
20	Repairs of bridges and trestles	130 21	.0166	31 22	19 05	50 27
21	Repairs of buildings	121 77	.0155	29 15	17 79	46 94
22	Superintendence & general expense	240 68	.0307	57 74	35 23	92 97
23	Law expenses	108 69	.0137	26 15	15 95	42 10
24	Stationery and printing	190 94	.0244	45 90	28 00	73 90
25	Rent account	8,449 36	1.0777	2,027 25	1,236 58	3,263 83
26	Extraordinary expenses	176 82	.0226	42 51	25 93	68 44
27	Insurance					
28	Construction account					
29	Taxes					
30	— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	905 56	.1155	217 26	132 53	349 79
		26,176 97	3.3389	6,280 74	3,831 15	10,111 89

Total cost of carrying freight on Shelby R. R., $26,176.97, divided by 783,994, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 3.3389 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	188,108	3.3389	6,280 74	6,712 73	431 99
Freight going to or over Nor. div. of the C. & O. R. R.	114,743	3.3389	3,831 15	4,608 92	777 77
Total	302,851		10,111 89	11,321 65	1,209 76

175 Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1886—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	13,781 90	.1005	80 54	55 78	136 32
2	Engineers, firemen, conductors, brakemen, etc	38,636 10	.2818	225 82	156 40	382 22
3	Hire of engines and cars	5,709 39	.0416	33 34	23 09	56 43
4	Employees killed or injured	729 87	.0054	4 33	3 00	7 33
5	Individuals killed or injured	2,209 68	.0161	12 90	8 94	21 84
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	2,421 36	.0177	14 18	9 82	24 00
9	Expense at stations	23,945 93	.1746	139 92	96 91	236 83
10	Locomotive repairs	11,286 69	.0823	65 95	45 68	111 63
11	Round-house expenses	6,056 40	.0442	35 42	24 53	59 95
12	Supplies for locomotives	24,109 84	.1758	140 88	97 57	238 45
13	Telegraph expenses and repairs	5,738 11	.0419	33 58	23 26	56 84
14	Sleeping-car hire	7,876 80	.0574	46 00	31 86	77 86
15	Sleeping-car expenses	2,071 12	.0151	12 10	8 38	20 48
16	Train expenses	7,005 41	.0510	40 87	28 31	69 18
17	Car repairs—pass., bag., & express.	16,753 04	.1222	97 92	67 82	165 74
18	Sleeping-car repairs	277 95	.0020	1 60	1 11	2 71
19	Repairs of roadway	41,301 51	.3012	241 37	167 17	408 54
20	Repairs of bridges and trestles	4,044 14	.0295	23 64	16 37	40 01
21	Repairs of buildings	2,972 49	.0217	17 39	12 04	29 43
22	Superintendence & gen. expense	3,545 87	.0259	20 75	14 38	35 13
23	Law expenses	1,709 48	.0125	10 02	6 94	16 96
24	Stationery and printing	4,739 04	.0346	27 73	19 20	46 93
25	Rent account	18,449 42	.1345	107 78	74 65	182 43
26	Extraordinary expenses	13,069 73	.0953	76 37	52 89	129 26
27	Insurance	103 97	.0008	64	44	1 08
28	Construction account (credit)	801 73	.0059	4 73	3 27	8 00
29	Taxes	10,183 95	.0743	59 53	41 24	100 77
30	Passenger proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	13,438 76	.0980	78 53	54 39	132 92
		281,366 22	2.0520	1,644 37	1,138 90	2,783 27

Total cost of carrying passengers on Cincinnati div., $281,366.22, divided by 13,713,266, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.0520 cents.

Recapitulation.

	Number passenger carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	80,135	2.0520	1,644 37	1,701 01	56 64
Passengers going to or over Nor. div. of the C. & O. R. R.	55,502	2.0520	1,138 90	1,499 16	360 26
Total	135,637		2,783 27	3,200 17	416 90

176 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1886—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	4,790 17	.0072	15 77	5 72	21 49
2	Engineers, firemen, conductors, brakemen, etc	78,381 11	.1175	257 38	93 39	350 77
3	Hire of engines and cars	2,961 48	.0045	9 85	3 58	13 43
4	Employees killed or injured	1,627 76	.0024	5 25	1 92	7 17
5	Individuals killed or injured	812 97	.0012	2 63	95	3 58
6	Loss or damage to freight	4,031 49	.0060	13 13	4 78	17 91
7	Damage to property					
8	Stock killed or injured	1,367 56	.0021	4 60	1 67	6 27
9	Expense at stations	129,004 69	.1933	423 42	153 63	577 05
10	Locomotive repairs	27,348 45	.0410	89 82	32 58	122 40
11	Round-house expenses	9,783 63	.0147	32 20	11 68	43 88
12	Supplies for locomotives	52,286 27	.0784	171 73	62 32	234 05
13	Telegraph expenses and repairs	7,671 60	.0115	25 19	9 14	34 33
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	11,234 60	.0168	36 80	13 35	50 15
17	Car repairs, freight	39,711 62	.0595	130 33	47 29	177 62
18	Sleeping-car repairs					
19	Repairs of roadway	55,218 31	.0828	181 38	65 80	247 18
20	Repairs of bridges and trestles	5,406 85	.0081	17 74	6 84	24 18
21	Repairs of buildings	3,974 07	.0060	13 14	4 77	17 91
22	Superintendence & gen. expense	9,118 32	.0137	30 01	10 89	40 90
23	Law expenses	2,285 51	.0034	7 43	2 72	10 15
24	Stationery and printing	6,335 90	.0095	20 81	7 55	28 36
25	Rent account	38,294 51	.0574	125 73	45 62	171 35
26	Extraordinary expenses	17,473 67	.0262	57 39	20 82	78 21
27	Insurance	139 02	.0002	45	15	60
28	Construction account (credit)	1,071 92	.0016	3 50	1 27	4 77
29	Taxes	13,648 30	.0204	44 69	16 21	60 90
30	Freight proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	20,982 49	.0315	69 00	25 04	94 04
		542,818 43	.8137	1,782 37	646 74	2,429 11

Total cost of carrying freight on Cincinnati div., $542,818.43, divided by 66,706,833, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .8137 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	219,045	.8137	1,782 37	5,309 71	3,527 34
Freight going to or over Nor. div. of the C. & O. R. R.	79,481	.8137	646 74	3,358 96	2,712 22
Total	298,526		2,429 11	8,668 67	6,239 56

177 Net earnings derived by Lexington branch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1886—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,582 01	.0387	2 04	4 17	6 21
2	Engineers, firemen, conductors, brakemen, etc.	16,168 14	.2423	12 76	26 12	38 88
3	Hire of engines and cars	1,522 78	.0228	1 20	2 46	3 66
4	Employees killed or injured	125 40	.0019	10	20	30
5	Individuals killed or injured	60 00	.0009	05	10	15
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	1,554 56	.0233	1 23	2 51	3 74
9	Expense at stations	6,605 86	.0990	5 21	10 67	15 88
10	Locomotive repairs	4,840 06	.0725	3 82	7 82	11 64
11	Round-house expenses	1,832 69	.0275	1 45	2 96	4 41
12	Supplies for locomotives	8,719 05	.1307	6 88	14 10	20 98
13	Telegraph expenses and repairs	2,525 84	.0379	2 00	4 09	6 09
14	Sleeping-car hire	1,907 76	.0286	1 51	3 08	4 59
15	Sleeping-car expenses	501 41	.0075	39	81	1 20
16	Train expenses	2,296 84	.0344	1 81	3 71	5 52
17	Car repairs—pass., bag., & express.	7,340 24	.1100	5 79	11 86	17 65
18	Sleeping-car repairs	67 29	.0010	05	11	16
19	Repairs of roadway	31,261 34	.4685	24 67	50 50	75 17
20	Repairs of bridges and trestles	564 09	.0085	45	92	1 37
21	Repairs of buildings	2,169 63	.0325	1 71	3 50	5 21
22	Superintendence & gen. expense	1,261 95	.0189	99	2 04	3 03
23	Law expenses	683 60	.0103	54	1 11	1 65
24	Stationery and printing	1,208 14	.0181	95	1 95	2 90
25	Rent account	272 09	.0041	22	44	66
26	Extraordinary expenses	215 55	.0032	17	34	51
27	Insurance					
28	Construction account	1,084 34	.0163	86	1 76	2 62
29	Taxes	6,533 12	.0979	5 15	11 55	15 70
30	Passenger proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	5,251 42	.0787	4 14	8 48	12 62
		109,155 20	1.6360	86 14	176 36	262 30

Total cost of carrying passengers on Lexington branch, $109,155.20, divided by 6,672,155, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.6360 cents.

Recapitulation.

	Number — carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	5,265	1.6360	86 14	154 48	68 34
Passengers going to or over Nor. div. of the C. & O. R. R.	10,780	1.6360	176 36	205 25	28 89
Total	16,045		262 50	359 73	97 23

178 **Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1886 - arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.**

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,048 49	.0098	2 05	29	2 34
2	Engineers, firemen, conductors, brakemen, etc.	19,609 05	.0947	19 87	2 75	22 62
3	Hire of engines and cars	460 41	.0022	46	06	52
4	Employees killed or injured	125 40	.0006	13	02	15
5	Individuals killed or injured	155 04	.0008	17	02	19
6	Loss or damage to freight	572 80	.0028	60	08	68
7	Damage to property					
8	Stock killed or injured	937 85	.0045	94	13	1 07
9	Expense at stations	16,222 67	.0784	16 45	2 28	18 73
10	Locomotive repairs	6,185 26	.0299	6 27	87	7 14
11	Round-house expenses	1,760 89	.0085	1 78	25	2 03
12	Supplies for locomotives	13,721 90	.0663	13 91	1 93	15 84
13	Telegraph expenses and repairs	1,872 39	.0090	1 89	26	2 15
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	3,636 79	.0176	3 70	51	4 21
17	Car repairs, freight	12,728 93	.0615	12 90	1 79	14 69
18	Sleeping-car repairs					
19	Repairs of roadway	23,173 79	.1119	23 47	3 26	26 73
20	Repairs of bridges and trestles	418 15	.0020	42	06	48
21	Repairs of buildings	1,608 34	.0078	1 63	23	1 86
22	Superintendence & gen. expense	3,153 19	.0152	3 19	44	3 63
23	Law expenses	506 74	.0024	50	07	57
24	Stationery and printing	895 58	.0043	90	13	1 03
25	Rent account	201 69	.0010	21	03	24
26	Extraordinary expenses	159 79	.0008	17	02	19
27	Insurance					
28	Construction account	803 77	.0039	82	11	93
29	Taxes	4,842 67	.0234	4 91	68	5 59
30	Freight proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	6,763 70	.0327	6 86	95	7 81
		122,565 28	.5920	124 20	17 22	141 42

Total cost of carrying freight on Lexington branch, $122,565.28, divided by 20,702,011, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .5920 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	20,982	.5920	124 20	347 26	223 06
Freight going to or over Nor. div. of the C. & O. R. R.	2,909	.5920	17 22	105 94	88 72
Total	23,891		141 42	453 20	311 78

179 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1886—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	27 22	.0032	4 03	2 71	6 74
2	Engineers, firemen, conductors, brakemen, etc	1,740 33	.2031	255 48	172 11	427 59
3	Hire of engines and cars	1,001 28	.1169	147 05	99 06	246 11
4	Employees killed or injured	34 20	.0040	5 03	3 39	8 42
5	Individuals killed or injured	554 53	.0647	81 38	54 83	136 21
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	192 69	.0225	28 30	19 07	47 37
9	Expense at stations	604 97	.0706	88 80	59 83	148 63
10	Locomotive repairs	522 93	.0610	76 73	51 69	128 42
11	Round-house expenses	153 38	.0179	22 51	15 17	37 68
12	Supplies for locomotives	903 36	.1054	132 58	89 32	221 90
13	Telegraph expenses and repairs	624 41	.0729	91 70	61 78	153 48
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	259 62	.0303	38 11	25 68	63 79
17	Car repairs—pass., bag., & express	867 47	.1013	127 43	85 84	213 27
18	Sleeping-car repairs					
19	Repairs of roadway	4,504 24	.5257	661 27	445 49	1,106 76
20	Repairs of bridges and trestles	172 49	.0201	25 29	17 03	42 32
21	Repairs of buildings	248 99	.0291	36 60	24 66	61 26
22	Superintendence & gen. expense	183 93	.0214	26 92	18 13	45 05
23	Law expenses	79 83	.0093	11 70	7 88	19 58
24	Stationery and printing	142 20	.0167	21 01	14 15	35 16
25	Rent account	6,878 86	.8029	1,009 96	680 39	1,690 35
26	Extraordinary expenses	3 79	.0005	62	43	1 05
27	Insurance					
28	Construction account					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby *railroad* of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	745 73	.0870	109 43	73 73	183 16
		20,446 45	2.3865	3,001 93	2,022 37	5,024 30

Total cost of carrying passengers on Shelby R. R., $20,446.45, divided by 856,755, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.3865 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passenger- coming from or over Nor. div. of the C. & O. R. R.	125,788	2.3865	3,001 93	2,613 97	*387 96
Passenger- going to or over Nor. div. of the C. & O. R. R.	84,742	2.3865	2,022 37	2,300 65	278 28
Total	210,530		5,024 30	4,914 62	*109 68

* Loss.

180 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1886—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	.....	.2906	457 02		
2	Engineers, firemen, conductors, brakemen, etc.	1,907 37	.1838	288 99	330 08	787 10
3	Hire of engines and cars	1,206 30	.0052	8 17	208 84	497 83
4	Employees killed or injured	34 20	.....	.....	5 91	14 08
5	Individuals killed or injured					
6	Loss or damage to freight	56 65	.0086	13 52	9 77	23 29
7	Damage to property					
8	Stock killed or injured	86 63	.0132	20 75	15 00	35 75
9	Expense at stations	1,295 04	.1973	310 22	224 18	534 40
10	Locomotive repairs	622 83	.0949	149 22	107 82	257 04
11	Round-house expenses	182 68	.0279	43 86	31 71	75 57
12	Supplies for locomotives	1,075 96	.1639	257 70	186 23	443 93
13	Telegraph expenses and repairs	743 72	.1134	178 30	128 85	307 15
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	304 65	.0465	73 11	52 84	125 95
17	Car repairs, freight	620 94	.0945	148 58	107 38	255 96
18	Sleeping-car repairs					
19	Repairs of roadway	5,363 95	.8173	1,285 06	928 64	2,213 70
20	Repairs of bridges and trestles	205 45	.0313	49 21	35 57	84 78
21	Repairs of buildings	296 56	.0452	71 07	51 36	122 43
22	Superintendence & gen'l expense	366 52	.0557	87 57	63 30	150 87
23	Law expenses	95 09	.0145	22 80	16 47	39 27
24	Stationery and printing	169 37	.0258	40 56	29 32	69 88
25	Rent account	8,193 14	1.2484	1,962 89	1,418 46	3,381 35
26	Extraordinary expenses	4 52	.0007	1 10	80	1 90
27	Insurance					
28	Construction account					
29	Taxes					
30	Freight proportion on basis of earnings charged to Shelby *R. R.* of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	936 34	.1427	224 37	162 14	386 51
		23,767 91	3.6214	5,694 07	4,114	9,808 74

Total cost of carrying freight on Shelby R. R., $23,767.91, divided by 656,322, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 3.6214 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	157,235	3.6214	5,694 07	4,591 96	*1,102 11
Freight going to or over Nor. div. of the C. & O. R. R.	113,622	3.6214	4,114 67	4,631 18	516 51
Total	270,857	.....	9,808 74	9,223 14	*585 60

* Loss.

181 Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1887—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	11,137 60	.0741	47 52	38 51	86 03
2	Engineers, firemen, conductors, brakemen, etc.	39,758 69	.2646	169 69	137 50	307 19
3	Hire of engines and cars	6,013 19	.0400	25 65	20 79	46 44
4	Employees killed or injured	324 32	.0031	1 99	1 61	3 60
5	Individuals killed or injured	2,062 64	.0137	8 79	7 12	15 91
6	Loss or damage to baggage	30 00	.0002	13	10	23
7	Damage to property					
8	Stock killed or injured	1,855 27	.0123	7 89	6 39	14 28
9	Expense at stations	25,891 54	.1723	110 50	89 53	200 03
10	Locomotive repairs	14,113 56	.0939	60 22	48 80	109 02
11	Round-house expenses	5,440 85	.0362	23 22	18 81	42 03
12	Supplies for locomotives	25,902 36	.1723	110 50	89 54	200 04
13	Telegraph expenses and repairs	4,790 13	.0318	20 39	16 52	36 91
14	Sleeping-car hire	8,500 20	.0565	36 24	29 36	65 60
15	Sleeping-car expenses	1,789 35	.0119	7 63	6 18	13 81
16	Train expenses	10,424 08	.0693	44 44	36 01	80 45
17	Car repairs, pass., bag., & express.	17,951 01	.1194	76 57	62 04	138 61
18	Sleeping-car repairs	54 96	.0003	19	16	35
19	Repairs of roadway	42,233 82	.2811	180 28	146 07	326 35
20	Repairs of bridges and trestles	4,759 01	.0317	20 33	16 47	36 80
21	Repairs of buildings	3,034 97	.0202	12 95	10 50	23 45
22	Superintendence & gen. expense	3,338 66	.0222	14 24	11 54	25 78
23	Law expenses	2,318 86	.0154	9 88	8 00	17 88
24	Stationery and printing	4,712 05	.0313	20 07	16 27	36 34
25	Rent account	19,051 00	.1268	81 32	65 89	147 21
26	Extraordinary expenses	3,788 99	.0252	16 16	13 10	29 26
27	Insurance	82 68	.0005	32	26	58
28	Construction account	14,479 59	.0963	61 76	50 04	111 80
29	Taxes	9,939 76	.0661	42 39	34 35	76 74
30	Passenger proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	13,232 42	.0880	36 44	45 73	102 17
		297,011 56	1.9767	1,267 70	1,027 19	2,294 89

Total cost of carrying passengers on Cincinnati div., $297,011.56, divided by 15,025,048, the number of passengers carried one mile, gives, as the average cost per — per mile, 1.9767 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	64,132	1.9767	1,267 70	1,805 46	537 76
Passengers going to or over Nor. div. of the C. & O. R. R.	51,965	1.9767	1,027 19	1,492 21	465 02
Total	116,097		2,294 89	3,297 67	1,002 78

182 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1887—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	4,961 44	.0057	17 47	5 22	22 69
2	Engineers, firemen, conductors, brakemen, etc	103,921 60	.1190	364 97	108 91	473 88
3	Hire of engines and cars	5,523 34	.0063	19 31	5 77	25 08
4	Employees killed or injured	8,908 35	.0102	31 27	9 34	40 61
5	Individuals killed or injured	1,332 29	.0015	4 60	1 37	5 97
6	Loss or damage to freight	6,572 17	.0076	23 30	6 96	30 26
7	Damage to property					
8	Stock killed or injured	2,111 47	.0024	7 36	2 20	9 56
9	Expense at stations	154,067 39	.1764	541 02	161 45	702 47
10	Locomotive repairs	33,876 99	.0388	118 97	35 51	154 48
11	Round-house expenses	10,583 97	.0121	37 11	11 07	48 18
12	Supplies for locomotives	68,676 11	.0786	241 01	71 94	312 95
13	Telegraph expenses and repairs	7,949 57	.0091	27 90	8 33	36 23
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	13,645 41	.0156	47 83	14 28	62 11
17	Car repairs, freight	56,974 21	.0652	199 93	59 67	259 60
18	Sleeping-car repairs					
19	Repairs of roadway	70,090 20	.0802	245 92	73 40	319 32
20	Repairs of bridges and trestles	7,897 91	.0091	27 90	8 33	36 23
21	Repairs of buildings	5,036 74	.0058	17 78	5 31	23 09
22	Superintendence & gen. expense	10,598 84	.0121	37 11	11 07	48 18
23	Law expenses	3,848 33	.0044	13 49	4 03	17 52
24	Stationery and printing	7,820 01	.0090	27 59	8 24	35 83
25	Rent account	48,262 82	.0553	169 57	50 61	220 18
26	Extraordinary expenses	6,288 12	.0071	21 77	6 50	28 27
27	Insurance	137 22	.0002	62	18	80
28	Construction account	24,392 11	.0278	85 25	25 44	110 69
29	Taxes	16,744 35	.0192	58 88	17 57	76 45
30	Freight proportion on basis of earnings charged to Cincinnati div'n of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	25,386 45	.0291	89 23	26 63	115 86
		705,607 41	.8078	2,477 16	739 33	3,216 49

Total cost of carrying freight on Cincinnati div'n, $705,607.41, divided by 87,344,117, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .8078 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	306,632	.8078	2,477 16	8,471 13	5,993 97
Freight going to or over Nor. div. of the C. & O. R. R.	91,524	.8078	739 33	3,537 63	2,798 30
Total	398,156		3,216 49	12,008 76	8,792 27

183 Net earnings derived by Lexington branch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1887—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,142 65	.0316	2 28	3 01	5 29
2	Engineers, firemen, conductors, brakemen, etc.	16,271 61	.2403	17 30	22 94	40 24
3	Hire of engines and cars	2,341 69	.0346	2 49	3 30	5 79
4	Employees killed or injured	131 57	.0019	14	18	32
5	Individuals killed or injured	368 18	.0054	39	51	90
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	1,144 86	.0169	1 22	1 61	2 83
9	Expense at stations	6,674 39	.0986	7 10	9 41	16 51
10	Locomotive repairs	5,957 93	.0880	6 34	8 40	14 74
11	Round-house expenses	1,367 10	.0202	1 46	1 92	3 38
12	Supplies for locomotives	9,052 02	.1337	9 63	12 76	22 39
13	Telegraph expenses and repairs	2,030 53	.0300	2 16	2 86	5 02
14	Sleeping-car hire	2,003 97	.0296	2 13	2 83	4 96
15	Sleeping-car expenses	402 41	.0061	44	58	1 02
16	Train expenses	4,657 38	.0688	4 96	6 56	11 52
17	Car repairs—pass., bag., & express.	7,918 59	.1169	8 42	11 16	19 58
18	Sleeping-car repairs	12 67	.0002	01	02	03
19	Repairs of roadway	26,419 51	.3901	28 07	37 26	65 33
20	Repairs of bridges and trestles	855 37	.0126	91	1 20	2 11
21	Repairs of buildings	2,598 15	.0384	2 77	3 66	6 43
22	Superintendence & gen. expense	1,965 24	.0290	2 09	2 76	4 85
23	Law expenses	1,172 16	.0174	1 25	1 66	2 91
24	Stationery and printing	1,214 94	.0179	1 29	1 71	3 00
25	Rent account	289 98	.0043	31	40	71
26	Extraordinary expenses	164 66	.0024	17	23	40
27	Insurance					
28	Construction account	3,786 03	.0559	4 02	5 34	9 36
29	Taxes	6,811 84	.1006	7 24	9 62	16 86
30	Passengers proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	6,738 78	.0994	7 16	9 49	16 65
		114,504 21	1.6908	121 75	161 38	283 13

Total cost of carrying passengers on Lexington branch, $114,504.21, divided by 6,772,159, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.6908 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passenger- coming from or over Nor. div. of the C. & O. R. R.	7,201	1.6908	121 75	209 13	87 38
Passenger- going to or over Nor. div. of the C. & O. R. R.	9,545	1.6908	161 38	237 82	76 44
Total	16,746		283 13	446 95	163 82

184 Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1887—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost — per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	*2,543 31	.0086	93	1 79	2 72
2	Engineers, firemen, conductors, brakemen, etc.	20,287 38	.0956	10 35	19 84	30 19
3	Hire of engines and cars	1,490 79	.0050	54	1 04	1 58
4	Employees killed or injured	5,942 24	.0201	2 18	4 17	6 35
5	Individuals killed or injured	58 50	.0002	02	04	06
6	Loss or damage to freight	382 77	.0013	14	27	41
7	Damage to property					
8	Stock killed or injured	890 58	.0030	33	62	95
9	Expense at stations	19,240 15	.0650	7 04	13 49	20 53
10	Locomotive repairs	8,143 36	.0275	2 98	5 70	8 68
11	Round-house expenses	1,824 13	.0062	67	1 29	1 96
12	Supplies for locomotives	18,443 61	.0623	6 74	12 93	19 67
13	Telegraph expenses and repairs	1,976 25	.0067	73	1 39	2 12
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	4,660 26	.0157	1 70	3 26	4 96
17	Car repairs, freight	19,458 16	.0657	7 11	13 64	20 75
18	Sleeping-car repairs	25,713 32	.0869	9 41	18 03	27 44
19	Repairs of roadway	832 51	.0028	30	58	88
20	Repairs of bridges and trestles	2,528 70	.0085	92	1 76	2 68
21	Repairs of buildings	3,026 26	.0102	1 10	2 12	3 22
22	Superintendence & gen. expense	1,140 84	.0039	42	81	1 23
23	Law expenses	1,182 46	.0039	42	81	1 23
24	Stationery and printing	282 02	.0010	11	21	32
25	Rent account	160 25	.0005	06	10	16
26	Extraordinary expenses					
27	Insurance	3,684 44	.0125	1 35	2 61	3 95
28	Construction account	6,629 05	.0224	2 42	4 65	7 07
29	Taxes					
30	Freight proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	5,445 11	.0184	1 99	3 82	5 81
		163,966 45	.5539	59 96	114 96	174 92

Total cost of carrying freight on Lexington branch, $163,966.45, divided by 29,602,093, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .5529 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	10,825	.5539	59 96	177 48	117 52
Freight going to or over Nor. div. of the C. & O. R. R.	20,756	.5539	114 96	335 76	220 80
Total	31,581		174 92	513 24	338 32

[* In this amount, 2,543.31, the figures 543 are erased.]

185 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1887—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	4 78	.0005	49	42	91
2	Engineers, firemen, conductors, brakemen, etc.	2,184 65	.2415	238 84	202 77	441 61
3	Hire of engines and cars	1,194 27	.1320	130 55	110 82	241 37
4	Employees killed or injured	69 82	.0077	7 61	6 47	14 08
5	Individuals killed or injured					
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	231 93	.0257	25 42	21 57	46 99
9	Expense at stations	555 44	.0614	60 72	51 55	112 27
10	Locomotive repairs	665 82	.0736	72 79	61 79	134 58
11	Round-house expenses	172 96	.0191	18 89	16 04	34 93
12	Supplies for locomotives	1,147 02	.1268	125 40	106 46	231 86
13	Telegraph expenses and repairs	452 32	.0500	49 45	41 98	91 43
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	644 39	.0712	70 42	59 77	130 19
17	Car repairs—pass., bag., & express.	1,095 61	.1211	119 77	101 67	221 44
18	Sleeping-car repairs					
19	Repairs of roadway	4,815 33	.5323	526 44	446 91	973 35
20	Repairs of bridges and trestles	242 01	.0268	26 50	22 50	49 00
21	Repairs of buildings	165 62	.0183	18 10	15 36	33 46
22	Superintendence & gen. expense	184 30	.0204	20 18	17 12	37 30
23	Law expenses	335 77	.0371	36 69	31 15	67 84
24	Stationery and printing	146 12	.0162	16 02	13 60	29 62
25	Rent account	6,524 30	.7213	713 36	605 59	1,318 95
26	Extraordinary expenses					
27	Insurance					
28	Construction account					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby *railroad* of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	882 46	.0975	96 43	81 85	178 28
		21,714 96	2.4005	2,374 07	2,015 39	4,389 46

Total cost of carrying passengers on Shelby R. R., $21,714.96, divided by 904,579, the number of passenger- carried one mile, gives, as the average cost per passenger per mile, 2.4005 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	98,899	2.4005	2,374 07	2,735 77	361 70
Passengers going to or over Nor. div. of the C. & O. R. R.	83,957	2.4005	2,015 39	2,345 74	330 35
Total	182,856		4,389 46	5,081 51	692 05

186 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1887—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	43				
2	Engineers, firemen, conductors, brakemen, etc	1,999 24	.2140	564 77	280 16	844 93
3	Hire of engines and cars	1,413 39	.1513	399 30	198 07	597 37
4	Employees killed or injured	94 82	.0102	26 92	13 35	40 27
5	Individuals killed or injured					
6	Loss or damage to —	78 54	.0084	22 18	10 99	33 17
7	Damage to property					
8	Stock killed or injured	111 47	.0119	31 41	15 57	46 98
9	Expense at stations	1,283 82	.1374	362 62	179 87	542 49
10	Locomotive repairs	883 31	.0945	249 40	123 71	373 11
11	Round-house expenses	229 45	.0246	64 84	32 29	97 13
12	Supplies for locomotives	1,521 70	.1623	429 65	213 13	642 78
13	Telegraph expenses and repairs	600 07	.0642	169 44	84 04	253 48
14	Sleeping car hire					
15	Sleeping-car expenses					
16	Train expenses	206 59	.0221	58 33	28 93	87 26
17	Car repairs, freight	862 56	.0923	243 60	120 83	364 43
18	Sleeping-car repairs					
19	Repairs of roadway	6,388 69	.6837	1,804 36	895 06	2,699 42
20	Repairs of bridges and trestles	321 06	.0344	90 79	45 03	135 82
21	Repairs of buildings	219 73	.0235	62 02	30 76	92 78
22	Superintendence & general expense	434 40	.0465	122 72	60 87	183 59
23	Law expenses	445 46	.0477	125 89	62 44	188 33
24	Stationery and printing	193 86	.0207	54 63	27 10	81 73
25	Rent account	8,655 66	.1178	310 89	154 21	465 10
26	Extraordinary expenses					
27	Insurance					
28	Construction account					
29	Taxes					
30	— proportion on basis of earnings charged to — of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	1,100 72	.9264	2,444 88	1,212 79	3,657 67
		27,044 97	2.8944	7,638 64	3,789 20	11,427 84

Total cost of carrying freight on Shelby R. R., $27,044.97, divided by 934,374, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 2.8944 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	263,911	2.8944	7,638 64	9,152 35	1,513 71
Freight going to or over Nor. div. of the C. & O. R. R.	130,915	2.8944	3,789 20	5,125 79	1,336 59
Total	394,826		11,427 84	14,278 14	2,850 30

187 Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1888—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	10,557 13	.0681	43 94	42 38	86 32
2	Engineers, firemen, conductors, brakemen, etc	41,244 32	.2661	171 71	165 59	337 30
3	Hire of engines and cars	7,287 80	.0470	30 33	29 25	59 58
4	Employees killed or injured	683 09	.0044	2 84	2 74	5 58
5	Individuals killed or injured	7,059 26	.0455	29 36	28 32	57 68
6	Loss or damage to baggage	58 63	.0004	25	25	50
7	Damage to property					
8	Stock killed or injured	2,506 95	.0162	10 45	10 08	20 53
9	Expense at stations	29,870 75	.1927	124 35	119 92	244 27
10	Locomotive repairs	15,415 74	.0995	64 21	61 92	126 13
11	Round-house expenses	5,888 99	.0380	24 52	23 65	48 17
12	Supplies for locomotives	28,453 13	.1835	118 42	114 18	232 60
13	Telegraph expenses and repairs	4,426 98	.0286	18 45	17 80	36 25
14	Sleeping-car hire	9,928 56	.0640	41 29	39 83	81 12
15	Sleeping-car expenses	2,340 95	.0151	9 74	9 40	19 14
16	Train expenses	11,492 75	.0741	47 82	46 11	93 93
17	Car repairs—pass., bag., & express	20,582 99	.1328	85 70	82 64	168 34
18	Sleeping-car repairs	68 55	.0004	25	25	50
19	Repairs of roadway	41,866 36	.2701	174 30	168 08	342 38
20	Repairs of bridges and trestles	6,179 08	.0399	25 75	24 83	50 58
21	Repairs of buildings	5,794 47	.0374	24 13	23 27	47 40
22	Superintendence & gen. expense	4,098 92	.0264	17 03	16 43	33 46
23	Law expenses	2,987 04	.0193	12 45	12 01	24 46
24	Stationery and printing	5,322 32	.0343	22 14	21 34	43 48
25	Rent account	11,882 71	.0766	49 43	47 67	97 10
26	Extraordinary expenses	7,523 39	.0485	31 30	30 18	61 48
27	Insurance	60 54	.0004	25	25	50
28	Construction account	13,345 27	.0861	55 56	53 58	109 14
29	Taxes	9,555 12	.0616	39 75	38 33	78 08
30	Passenger proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	15,224 24	.0982	63 36	61 11	124 47
		321,706 03	2.0752	1,339 08	1,291 39	2,630 47

Total cost of carrying passengers on Cincinnati div., $321,706.03, divided by 15,502,703, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.0752 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passenger- coming from or over Nor. div. of the C. & O. R. R.	64,529	2.0752	1,339 08	1,719 14	380 06
Passenger- going to or over Nor. div. of the C. & O. R. R.	62,231	2.0752	1,291 39	1,726 67	435 28
Total	127,760		2,630 47	3,445 81	815 34

188 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1888—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	5,241 40	.0052	14 75	4 45	19 20
2	Engineers, firemen, conductors, brakemen, etc	121,575 74	.1202	340 78	102 92	443 70
3	Hire of engines and cars	8,507 52	.0084	23 82	7 19	31 01
4	Employees killed or injured	3,270 28	.0032	9 07	2 74	11 81
5	Individuals killed or injured	3,037 04	.0030	8 51	2 56	11 07
6	Loss or damage to freight	6,006 48	.0059	16 73	5 05	21 78
7	Damage to property					
8	Stock killed or injured	1,645 33	.0016	4 54	1 37	5 91
9	Expense at stations	164,338 75	.1624	460 43	139 05	599 48
10	Locomotive repairs	39,905 60	.0395	111 99	33 82	145 81
11	Round-house expenses	12,802 07	.0126	35 72	10 79	46 51
12	Supplies for locomotives	82,225 12	.0813	230 50	69 61	300 11
13	Telegraph expenses and repairs	7,710 69	.0076	21 54	6 51	28 05
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	18,544 47	.0184	52 17	15 75	67 92
17	Car repairs, freight	82,102 76	.0812	230 21	69 53	299 74
18	Sleeping-car repairs					
19	Repairs of roadway	72,290 50	.0721	204 42	61 73	266 15
20	Repairs of bridges and trestles	10,762 40	.0106	30 05	9 08	39 13
21	Repairs of buildings	10,092 52	.0100	28 35	8 56	36 91
22	Superintendence & gen'l expense	14,648 19	.0145	41 10	12 42	53 52
23	Law expenses	5,202 68	.0052	14 75	4 45	19 20
24	Stationery and printing	9,270 13	.0092	26 08	7 88	33 96
25	Rent account	37,157 33	.0367	104 05	31 42	135 47
26	Extraordinary expenses	13,103 84	.0130	36 86	11 13	47 99
27	Insurance	105 45	.0001	28	09	37
28	Construction account	23,249 41	.0230	65 21	19 69	84 90
29	Taxes	16,642 61	.0165	46 78	14 13	60 91
30	Freight proportion on basis of earnings charged to Cincinnati div'n of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	26,849 17	.0266	75 41	22 78	98 19
		796,917 48	.7880	2,234 10	674 70	2,908 80

Total cost of carrying freight on Cincinnati div., $796,917.48, divided by 101,165,897, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .7880 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	283,515	.7880	2,234 10	6,577 13	4,343 03
Freight going to or over Nor. div. of the C. & O. R. R.	85,622	.7880	674 70	3,342 81	2,668 11
Total	369,137		2,908 80	9,919 94	7,011 14

189 Net earnings derived by Lexington branch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1888—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,247 99	.0318	2 75	2 67	5 42
2	Engineers, firemen, conductors, brakemen, etc.	16,450 54	.2328	20 12	19 53	39 65
3	Hire of engines and cars	1,632 31	.0231	2 00	1 93	3 93
4	Employees killed or injured	1,437 72	.0204	1 76	1 71	3 47
5	Individuals killed or injured	47 63	.0007	06	06	12
6	Loss or damage to baggage	7 50	.0001			
7	Damage to property					
8	Stock killed or injured	1,853 73	.0262	2 26	2 20	4 46
9	Expense at stations	6,840 06	.0968	8 37	8 12	16 49
10	Locomotive repairs	6,309 76	.0893	7 72	7 49	15 21
11	Round-house expenses	1,420 15	.0201	1 74	1 68	3 42
12	Supplies for locomotives	9,508 59	.1346	11 63	11 30	22 93
13	Telegraph expenses and repairs	1,748 37	.0247	2 13	2 08	4 21
14	Sleeping-car hire	1,924 59	.0272	2 35	2 28	4 63
15	Sleeping-car expenses	474 84	.0067	58	56	1 14
16	Train expenses	5,378 48	.0761	6 58	6 38	12 96
17	Car repairs—pass., bag., & express.	8,797 82	.1245	10 76	10 45	21 21
18	Sleeping-car repairs	13 90	.0002	02	01	03
19	Repairs of roadway	21.293 12	.3014	26 06	25 29	51 35
20	Repairs of bridges and trestles	826 85	.0117	1 01	98	1 99
21	Repairs of buildings	2,940 08	.0416	3 60	3 49	7 09
22	Superintendence & gen. expense	2,116 84	.0300	2 59	2 52	5 11
23	Law expenses	725 83	.0103	89	87	1 76
24	Stationery and printing	1,492 68	.0211	1 82	1 77	3 59
25	Rent account	343 88	.0049	42	41	83
26	Extraordinary expenses	2,335 12	.0331	2 86	2 78	5 64
27	Insurance					
28	Construction account	6,825 31	.0966	8 35	8 11	16 46
29	Taxes	6,675 18	.0945	8 17	7 93	16 10
30	Passenger proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	8,849 26	.1252	10 82	10 51	21 33
		120,518 15	1.7057	147 42	143 11	290 53

Total cost of carrying passengers on Lexington branch, $120,518.15, divided by 7,065,552, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.7057 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	8,643	1.7057	147 42	246 40	98 98
Passengers going to or over Nor. div. of the C. & O. R. R.	8,390	1.7057	143 11	234 41	91 30
Total	17,033		290 53	480 81	190 28

190 **Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1888 - arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.**

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,729 53	.0096	82	86	1 68
2	Engineers, firemen, conductors, brakemen, etc.	28,881 04	.1006	8 58	9 01	17 59
3	Hire of engines and cars	741 49	.0026	22	23	45
4	Employees killed or injured	3,398 05	.0119	1 01	1 07	2 08
5	Individuals killed or injured	6 07				
6	Loss or damage to freight	3,216 70	.0112	96	1	1 96
7	Damage to property					
8	Stock killed or injured	1,272 77	.0044	38	39	77
9	Expense at stations	20,086 52	.0699	5 96	6 26	12 22
10	Locomotive repairs	9,066 93	.0316	2 69	2 83	5 52
11	Round-house expenses	1,740 03	.0061	52	55	1 07
12	Supplies for locomotives	18,999 66	.0662	5 65	5 93	11 58
13	Telegraph expenses and repairs	1,682 51	.0059	50	53	1 03
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	5,853 91	.0204	1 74	1 83	3 57
17	Car repairs, freight	23,406 34	.0815	6 95	7 30	14 25
18	Sleeping-car repairs					
19	Repairs of roadway	20,491 13	.0710	6 06	6 35	12 41
20	Repairs of bridges and trestles	795 71	.0028	24	25	49
21	Repairs of buildings	2,829 36	.0099	84	89	1 73
22	Superintendence & gen. expense	3,928 60	.0106	90	95	1 85
23	Law expenses	698 50	.0024	21	21	42
24	Stationery and printing	1,436 46	.0050	43	44	87
25	Rent account	302 11	.0011	09	10	19
26	Extraordinary expenses	2,247 17	.0079	67	71	1 38
27	Insurance					
28	Construction account	6,568 16	.0229	1 95	2 05	4 00
29	Taxes	6,423 68	.0224	1 91	2 01	3 92
30	Freight proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	5,960 19	.0208	1 77	1 87	3 64
		171,862 62	.5987	51 05	53 62	104 67

Total cost of carrying freight on Lexington branch, $171,862.62, divided by 28,703,928, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .5987 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	8,528	.5987	51 05	177 31	126 26
Freight going to or over Nor. div. of the C. & O. R. R.	8,956	.5987	53 62	177 73	124 11
Total	17,484		104 67	355 04	250 37

191 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1888—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Cost of carrying passengers— Going to or over Nor. division, C. & O. R. R.	Cost of carrying passengers— Total both directions.
1	Advertising and soliciting	25 72	.0030	2 80	2 67	5 47
2	Engineers, firemen, conductors, brakemen, etc.	2,390 56	.2826	263 78	251 42	515 20
3	Hire of engines and cars	1,252 75	.1481	138 24	131 76	270 00
4	Employees killed or injured	224 51	.0265	24 73	23 58	48 31
5	Individuals killed or injured	31				
6	Loss or damage to baggage					
7	Damage to property					
8	Stock killed or injured	561 01	.0663	61 88	58 98	120 86
9	Expense at stations	663 18	.0784	73 18	69 75	142 93
10	Locomotive repairs	840 05	.0992	92 59	88 25	180 84
11	Round-house expenses	315 29	.0373	34 88	33 19	68 07
12	Supplies for locomotives	1,382 43	.1634	152 51	145 37	297 88
13	Telegraph expenses and repairs	353 41	.0418	39 02	37 19	76 21
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	1,085 46	.1283	119 69	114 14	233 83
17	Car repairs—pass., bag., & express.	1,318 20	.1558	145 42	138 61	284 03
18	Sleeping-car repairs					
19	Repairs of roadway	5,694 57	.6732	628 36	598 93	1,227 29
20	Repairs of bridges and trestles	290 03	.0343	32 02	30 52	62 54
21	Repairs of buildings	379 76	.0449	41 91	39 95	81 86
22	Superintendence & gen. expense	184 14	.0218	20 35	19 39	39 74
23	Law expenses	71 27	.0084	7 84	7 47	15 31
24	Stationery and printing	193 90	.0229	21 38	20 37	41 75
25	Rent account	7,491 12	.8856	826 61	787 89	1,614 50
26	Extraordinary expenses	158 61	.0188	17 55	16 73	34 28
27	Insurance					
28	Construction account					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby *R. R.* of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	817 88	.0967	90 25	86 03	176 28
		25,694 16	3.0373	2,834 99	2,702 19	5,537 18

Total cost of carrying passengers on Shelby R. R., $25,694.16, divided by 845,933, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 3.0373 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	93,339	3.0373	2,834 99	2,434 53	*400 46
Passengers going to or over Nor. div. of the C. & O. R. R	88,967	3.0373	2,702 19	2,502 17	*200 02
Total	182,306		5,537 18	4,936 70	*600 48

* Loss.

192 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1888—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting					
2	Engineers, firemen, conductors, brakemen, etc	1,840 11	.2359	415 24	276 72	691 96
3	Hire of engines and cars	1,276 47	.1637	288 15	192 03	480 18
4	Employees killed or injured	267 21	.0343	60 37	40 24	100 61
5	Individuals killed or injured	30				
6	Loss or damage to freight	59 77	.0077	13 56	9 03	22 59
7	Damage to property					
8	Stock killed or injured	88 72	.0114	20 07	13 37	33 44
9	Expense at stations	1,310 36	.1680	295 72	197 07	492 79
10	Locomotive repairs	874 33	.1121	197 32	131 50	328 82
11	Round-house expenses	328 15	.0421	74 10	49 39	123 49
12	Supplies for locomotives	1,438 86	.1845	324 76	216 43	541 19
13	Telegraph expenses and repairs	367 84	.0471	82 91	55 25	138 16
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	641 06	.0822	144 69	96 42	241 11
17	Car repairs, freight	975 86	.1251	220 20	146 75	366 95
18	Sleeping-car repairs					
19	Repairs of roadway	5,906 23	.7573	1,333 01	888 35	2,221 36
20	Repairs of bridges and trestles	301 87	.0387	68 12	45 40	113 52
21	Repairs of buildings	395 26	.0507	89 24	59 47	148 71
22	Superintendence & general expense	191 65	.0246	43 30	28 86	72 16
23	Law expenses	74 17	.0095	16 73	11 14	27 87
24	Stationery and printing	201 81	.0259	45 59	30 38	75 97
25	Rent account	7,796 88	.9997	1,759 69	1,172 70	2,932 39
26	Extraordinary expenses	165 08	.0211	37 14	24 75	61 89
27	Insurance					
28	Construction account					
29	Taxes					
30	Freight proportion on basis of earnings charged to Shelby R. R. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	1,187 99	.1523	268 08	178 66	446 74
		25,689 98	3.2939	5,797 99	3,863 91	9,661 90

Total cost of carrying freight on Shelby R. R., $25,689.98, divided by 779,918, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 3.2939 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	176,022	3.2939	5,797 99	5,476 11	*321 88
Freight going to or over Nor. div. of the C. & O. R. R.	117,305	3.2939	3,863 91	4,853 01	989 10
Total	293,327		9,661 90	10,329 12	667 22

*Loss.

193 Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1889—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	10,998 30	.0647	40 29	36 44	76 73
2	Engineers, firemen, conductors, brakemen, etc	47,131 78	.2772	172 60	156 14	328 74
3	Hire of engines and cars	9,741 77	.0573	35 68	32 28	67 96
4	Employees killed or injured	1,289 34	.0075	4 67	4 22	8 89
5	Individuals killed or injured	18,581 93	.1093	68 06	61 56	129 62
6	Loss or damage to baggage	7,697 11	.0453	28 21	25 52	53 73
7	Damage to property					
8	Stock killed or injured	2,871 67	.0169	10 52	9 52	20 04
9	Expense at stations	28,705 75	.1689	105 17	95 14	200 31
10	Locomotive repairs	19,034 31	.1119	69 67	63 03	132 70
11	Round-house expenses	5,537 60	.0325	20 24	18 31	38 55
12	Supplies for locomotives	31,722 47	.1866	116 18	105 11	221 29
13	Telegraph expenses and repairs	4,645 27	.0279	17 37	15 71	33 08
14	Sleeping-car hire	11,831 39	.0696	43 34	39 20	82 54
15	Sleeping-car expenses	3,027 34	.0178	11 08	10 02	21 10
16	Train expenses	11,758 47	.0692	43 09	38 98	82 07
17	Car repairs—pass., bag., & express	19,271 12	.1134	70 61	63 87	134 48
18	Sleeping-car repairs	42 66	.0002	12	11	23
19	Repairs of roadway	48,357 49	.2844	177 08	160 19	337 27
20	Repairs of bridges and trestles	11,713 54	.0689	42 90	38 81	81 71
21	Repairs of buildings	3,239 13	.0190	11 83	10 70	22 53
22	Superintendence & gen. expense	3,459 31	.0203	12 64	11 43	24 07
23	Law expenses	2,974 80	.0175	10 90	9 86	20 76
24	Stationery and printing	5,663 10	.0333	20 73	18 76	39 49
25	Rent account	11,237 08	.0661	41 16	37 23	78 39
26	Extraordinary expenses	1,413 58	.0083	5 17	4 68	9 85
27	Insurance	22 26	.0001	06	06	12
28	Construction account	26,717 26	.1572	97 88	88 55	186 43
29	Taxes	9,369 38	.0551	34 30	31 04	65 34
30	Passenger proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	18,248 84	.1073	66 81	60 44	127 25
		376,304 05	2.2137	1,378 36	1,246 91	2,625 27

Total cost of carrying passengers on Cincinnati div., $376,304.05, divided by 16,998,551, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.2137 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	62,265	2.2137	1,378 36	1,594 04	215 68
Passengers going to or over Nor. div. of the C. & O. R. R.	56,327	2.2137	1,246 91	1,560 07	313 16
Total	118,592		2,625 27	3,154 11	528 84

194 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1889—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	6,417 40	.0062	14 18	6 26	20 44
2	Engineers, firemen, conductors, brakemen, etc	131,865 72	.1264	289 01	127 60	416 61
3	Hire of engines and cars	11,149 10	.0107	24 45	10 82	35 27
4	Employees killed or injured	7,206 42	.0069	15 78	6 96	22 74
5	Individuals killed or injured	1,814 60	.0017	3 88	1 72	5 60
6	Loss or damage to freight	10,466 57	.0100	22 86	10 09	32 95
7	Damage to property					
8	Stock killed or injured	2,991 20	.0029	6 62	93	9 55
9	Expense at stations	176,535 30	.1692	386 86	80	557 67
10	Locomotive repairs	41,661 54	.0399	91 23	40 28	131 51
11	Round-house expenses	11,320 64	.0109	24 92	11 00	35 92
12	Supplies for locomotives	88,450 81	.0848	193 88	85 61	279 49
13	Telegraph expenses and repairs	7,563 71	.0072	16 46	7 27	23 73
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	20,766 66	.0199	45 50	20 09	65 59
17	Car repairs, freight	71,919 75	.0689	157 53	69 56	227 09
18	Sleeping-car repairs					
19	Repairs of roadway	78,738 52	.0754	172 39	76 12	248 51
20	Repairs of bridges and trestles	19,072 63	.0183	41 84	18 47	60 31
21	Repairs of buildings	5,274 17	.0051	11 66	5 15	16 81
22	Superintendence & gen. expense	8,104 49	.0078	17 83	7 87	25 70
23	Law expenses	4,843 74	.0046	10 52	4 64	15 16
24	Stationery and printing	9,221 00	.0088	20 12	8 88	29 00
25	Rent account	38,637 06	.0370	84 60	37 35	121 95
26	Extraordinary expenses	2,301 67	.0022	5 03	2 22	7 25
27	Insurance	36 24				
28	Construction account	43,502 62	.0417	95 35	42 09	137 44
29	Taxes	15,255 79	.0146	33 38	14 74	48 12
30	Freight proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	28,268 74	.0271	61 94	27 36	89 30
		843,386 09	.8082	1,847 82	815 89	2,663 71

Total cost of carrying freight on Cincinnati div., $843,386.09, divided by 104,355,484, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .8082 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	228,639	.8082	1,847 82	6,204 34	4,356 52
Freight going to or over Nor. div. of the C. & O. R. R.	100,955	.8082	815 89	3,073 56	2,257 67
Total	329,594		2,663 71	9,277 90	6,614 19

195 Net earnings derived by Lexington br'ch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1889—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	1,857 48	.0270	2 19	1 84	4 03
2	Engineers, firemen, conductors, brakemen, etc.	16,825 96	.2447	19 85	16 69	36 54
3	Hire of engines and cars	2,751 56	.0400	3 25	2 72	5 97
4	Employees killed or injured	212 69	.0031	25	21	46
5	Individuals killed or injured	26 74	.0004	03	03	06
6	Loss or damage to baggage	3 50	.0001	01	01	02
7	Damage to property					
8	Stock killed or injured	1,951 61	.0284	2 30	1 94	4 24
9	Expense at stations	6,833 77	.0994	8 07	6 77	14 84
10	Locomotive repairs	6,600 59	.0960	7 79	6 55	14 34
11	Round-house expenses	1,294 29	.0188	1 53	1 28	2 81
12	Supplies for locomotives	10,052 33	.1462	11 86	9 97	21 83
13	Telegraph expenses and repairs	1,941 89	.0282	2 29	1 92	4 21
14	Sleeping-car hire	1,249 38	.0182	1 48	1 23	2 71
15	Sleeping-car expenses	474 94	.0070	57	48	1 05
16	Train expenses	4,777 96	.0695	5 64	4 74	10 38
17	Car repairs, pass., bag., & express.	7,453 84	.1084	8 80	7 38	16 18
18	Sleeping-car repairs	6 54	.0001	01	01	02
19	Repairs of roadway	22,232 77	.3233	26 23	22 05	48 28
20	Repairs of bridges and trestles	971 55	.0141	1 14	97	2 11
21	Repairs of buildings	1,458 71	.0212	1 72	1 45	3 17
22	Superintendence & gen. expense	1,503 32	.0218	1 77	1 49	3 26
23	Law expenses	519 03	.0075	61	51	1 12
24	Stationery and printing	1,536 47	.0223	1 82	1 51	3 33
25	Rent account	525 96	.0076	62	51	1 13
26	Extraordinary expenses	4 48	.0001	01	01	02
27	Insurance					
28	Construction account	5,650 79	.0821	6 66	5 60	12 26
29	Taxes	6,468 17	.0940	7 63	6 41	14 04
30	Passenger proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	6,911 96	.1005	8 16	6 85	15 01
		112,098 28	1.6300	132 29	111 13	243 42

Total cost of carrying passengers on Lexington branch, $112,098.28, divided by 6,877,184, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.6300 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	8,116	1.6300	132 29	218 93	86 64
Passengers going to or over Nor. div. of the C. & O. R. R.	6,818	1.6300	111 13	164 24	53 11
Total	14,934		243 42	383 17	139 75

196 Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1889 - arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,484 16	.0093	2 21	74	2 95
2	Engineers, firemen, conductors, brakemen, etc.	26,427 79	.0993	23 60	7 90	31 50
3	Hire of engines and cars	685 80	.0026	61	21	82
4	Employees killed or injured	406 14	.0015	35	12	47
5	Individuals killed or injured	94 99	.0003	09	02	11
6	Loss or damage to freight	756 78	.0028	67	22	89
7	Damage to property					
8	Stock killed or injured	1,517 30	.0057	1 36	45	1 81
9	Expense at stations	18,816 59	.0706	16 78	5 62	22 40
10	Locomotive repairs	8,068 72	.0303	7 20	2 41	9 61
11	Round-house expenses	1,524 62	.0057	1 36	45	1 81
12	Supplies for locomotives	17,912 59	.0072	15 98	5 34	21 32
13	Telegraph expenses and repairs	1,754 63	.0066	1 56	53	2 09
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	5,075 08	.0190	4 52	1 51	6 03
17	Car repairs, freight	17,264 22	.0647	15 37	5 15	20 52
18	Sleeping-car repairs					
19	Repairs of roadway	20,088 77	.0753	17 90	5 99	23 89
20	Repairs of bridges and trestles	877 85	.0033	79	26	1 05
21	Repairs of buildings	1,318 05	.0049	1 16	39	1 55
22	Superintendence & gen. expense	4,083 53	.0153	3 63	1 22	4 85
23	Law expenses	468 98	.0018	43	14	57
24	Stationery and printing	1,388 31	.0052	1 24	41	1 65
25	Rent account	150 29	.0006	14	05	19
26	Extraordinary expenses	4 05				
27	Insurance					
28	Construction account	5,105 85	.0191	4 54	1 52	6 06
29	Taxes	5,844 42	.0219	5 21	1 74	6 95
30	Freight proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	6,748 90	.0253	6 02	2 01	8 03
		148,868 41	.5583	132 72	44 40	177 12

Total cost of carrying freight on Lexington branch, $148,868.41, divided by 26,662,549, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .5583 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	23,771	.5583	132 72	522 59	389 87
Freight going to or over Nor. div. of the C. & O. R. R.	7,952	.5583	44 40	172 30	127 90
Total	31,723		177 12	694 89	517 77

197 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1889—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	11 95	.0016	1 42	1 40	2 82
2	Engineers, firemen, conductors, brakemen, etc.	2,020 22	.2714	242 48	235 85	478 33
3	Hire of engines and cars	1,158 60	.1557	139 11	135 31	274 42
4	Employees killed or injured	60 67	.0082	7 33	7 12	14 45
5	Individuals killed or injured	14 27	.0019	1 70	1 65	3 35
6	Loss or damage to baggage	1 75	.0002	18	17	35
7	Damage to property					
8	Stock killed or injured	310 84	.0418	37 35	36 32	73 67
9	Expense at stations	591 87	.0795	71 03	69 09	140 12
10	Locomotive repairs	691 28	.0929	83 00	80 73	163 73
11	Round-house expenses	302 41	.0406	36 27	35 29	71 56
12	Supplies for locomotives	1,183 48	.1590	142 06	138 17	280 23
13	Telegraph expenses and repairs	401 35	.0539	48 16	46 84	95 00
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	1,014 22	.1363	121 78	118 44	240 22
17	Car repairs—pass., bag., & express.	1,048 42	.1409	125 89	122 44	248 33
18	Sleeping-car repairs					
19	Repairs of roadway	6,639 06	.8920	796 97	775 15	1,572 12
20	Repairs of bridges and trestles	141 62	.0190	16 98	16 51	33 49
21	Repairs of buildings	854 41	.1148	102 57	99 76	202 33
22	Superintendence & gen. expense	180 59	.0243	21 71	21 12	42 83
23	Law expenses	149 61	.0200	17 87	17 38	35 25
24	Stationery and printing	162 77	.0219	19 57	19 03	38 60
25	Rent account	6,568 18	.8822	788 21	766 64	1,554 85
26	Extraordinary expenses	17 62	.0024	2 14	2 09	4 23
27	Insurance					
28	Construction account					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby *R. R.* of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	687 06	.0923	82 47	80 21	162 68
		24,212 25	3.2528	2,906 25	2,826 71	5,732 96

Total cost of carrying passengers on Shelby R. R., $24,212.25, divided by 744,340, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 3.2528 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	89,346	3.2528	2,906 25	2,274 84	*631 41
Passengers going to or over Nor. div. of the C. & O. R. R.	86,901	3.2528	2,826 71	2,375 81	*450 90
Total	176,247		5,732 96	4,650 65	*1,082 31

* Loss.

198 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1889—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting					
2	Engineers, firemen, conductors, brakemen, etc	2,033 51	.2901	551 10	403 62	954 72
3	Hire of engines and cars	1,181 66	.1086	320 29	234 57	554 86
4	Employees killed or injured	11,062 81	1.5784	2,998 47	2,196 03	5,194 50
5	Individuals killed or injured	7 05	.0010	1 90	1 39	3 29
6	Loss or damage to freight	22 31	.0032	6 08	4 45	10 53
7	Damage to property					
8	Stock killed or injured	85 04	.0122	23 17	16 98	40 15
9	Expense at stations	1,298 69	.1853	352 01	257 81	609 82
10	Locomotive repairs	917 48	.1309	248 67	182 12	430 79
11	Round-house expenses	401 36	.0572	108 66	79 58	188 24
12	Supplies for locomotives	1,570 72	.2241	425 72	311 79	737 51
13	Telegraph expenses and repairs	532 68	.0760	144 38	105 74	250 12
14	Sleeping car hire					
15	Sleeping-car expenses					
16	Train expenses	593 31	.0847	160 91	117 84	278 75
17	Car repairs, freight	676 01	.0965	183 32	134 26	317 58
18	Sleeping-car repairs					
19	Repairs of roadway	8,816 16	1.2579	2,389 62	1,750 12	4,139 74
20	Repairs of bridges and trestles	187 97	.0268	50 91	37 29	88 20
21	Repairs of buildings	1,133 98	.1618	307 37	225 11	532 48
22	Superintendence & general expense	239 69	.0342	64 97	47 58	112 55
23	Law expenses	798 56	.0283	53 75	39 38	93 13
24	Stationery and printing	216 03	.0308	58 51	42 85	101 36
25	Rent account	8,717 32	1.2438	2,362 84	1,730 50	4,093 34
26	Extraordinary expenses	23 38	.0033	6 27	4 59	10 86
27	Insurance					
28	Construction account					
29	Taxes					
30	Freight proportion on basis of earnings charged to Shelby R. R. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	907 49	.1295	246 01	180 17	426 18
		40,823 21	5.8246	11,061 93	8,103 77	19,168 70

Total cost of carrying freight on Shelby R. R., $40,823 21, divided by 700,875, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 5.8246 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	189,969	5.8246	11,064 93	6,419 88	*4,645 05
Freight going to or over Nor. div. of the C. & O. R. R.	139,130	5.8246	8,103 77	4,953 87	*3,149 90
Total	329,099	.....	19,168 70	11,373 75	*7,794 95

199 Net earnings derived by Cincinnati div. of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1890—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	11,168 54	.0639	42 94	38 77	81 71
2	Engineers, firemen, conductors, brakemen, etc	51,856 92	.2968	199 42	180 08	379 50
3	Hire of engines and cars	10,610 26	.0607	40 79	36 83	77 62
4	Employees killed or injured	1,710 18	.0098	6 58	5 95	12 53
5	Individuals killed or injured	4,444 02	.0254	17 07	15 41	32 48
6	Loss or damage to baggage	54 77	.0003	20	18	38
7	Damage to property	357 45	.0021	1 41	1 27	2 68
8	Stock killed or injured	1,942 42	.0111	7 46	6 73	14 19
9	Expense at stations	33,159 45	.1898	127 53	115 16	242 69
10	Locomotive repairs	19,777 24	.1132	76 06	68 68	144 74
11	Round-house expenses	5,385 90	.0308	20 69	18 69	39 38
12	Supplies for locomotives	42,482 33	.2431	163 34	147 50	310 84
13	Telegraph expenses and repairs	4,157 66	.0238	15 99	14 44	30 43
14	Sleeping-car hire	13,934 00	.0798	53 62	48 42	102 04
15	Sleeping-car expenses	3,393 31	.0194	13 04	11 77	24 81
16	Train expenses	12,745 03	.0729	48 98	44 23	93 21
17	Car repairs—pass., bag., & express	19,152 07	.1096	73 64	66 50	140 14
18	Sleeping-car repairs	3,924 24	.0224	15 05	13 59	28 64
19	Repairs of roadway	49,686 72	.2844	191 09	172 55	363 64
20	Repairs of bridges and trestles	39,038 50	.2234	150 11	135 54	285 65
21	Repairs of buildings	4,190 89	.0240	16 13	14 56	30 69
22	Superintendence & gen. expense	3,682 42	.0211	14 18	12 80	26 98
23	Law expenses	3,013 35	.0173	11 62	10 50	22 12
24	Stationery and printing	5,987 36	.0343	23 05	20 81	43 86
25	Rent account	11,675 03	.0668	44 88	40 53	85 41
26	Extraordinary expenses	1,078 58	.0062	4 17	3 76	7 93
27	Insurance	101 91	.0006	40	36	76
28	Construction account	121,779 47	.6970	468 32	422 89	891 21
29	Taxes	8,684 68	.0497	33 39	30 15	63 54
30	Passenger proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	18,090 73	.1035	69 54	62 80	132 34
		507,265 43	2.9032	1,950 69	1,761 45	3,712 14

Total cost of carrying passengers on Cincinnati div., $507,265.43, divided by 17,472,634, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 2.9032 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	67,191	2.9032	1,950 69	1,838 77	*111 92
Passengers going to or over Nor. div. of the C. & O. R. R.	60,673	2.9032	1,761 45	1,743 95	*17 50
Total	127,864		3,712 14	3,582 72	*129 42

* Loss.

200 Net earnings derived by Cincinnati div. of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1890—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	7,189 63	.0056	13 71	5 77	19 48
2	Engineers, firemen, conductors, brakemen, etc	150,195 14	.1178	288 48	121 41	409 89
3	Hire of engines and cars	12,772 97	.0100	24 49	10 31	34 80
4	Employees killed or injured	11,258 05	.0088	21 55	9 07	30 62
5	Individuals killed or injured	1,364 37	.0011	2 69	1 13	3 82
6	Loss or damage to freight	8,998 93	.0071	17 39	7 32	24 71
7	Damage to property	636 95	.0005	1 23	52	1 75
8	Stock killed or injured	1,706 26	.0013	3 18	1 34	4 52
9	Expense at stations	181,813 39	.1429	349 95	147 27	497 22
10	Locomotive repairs	53,971 00	.0423	103 59	43 59	147 18
11	Round-house expenses	12,034 90	.0094	23 02	9 69	32 71
12	Supplies for locomotives	92,647 69	.0726	177 79	74 82	352 61
13	Telegraph expenses and repairs	7,408 69	.0058	14 20	5 98	20 18
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	30,276 27	.0237	58 04	24 42	82 46
17	Car repairs, freight	86,609 76	.0680	166 53	70 08	236 61
18	Sleeping-car repairs					
19	Repairs of roadway	88,538 52	.0695	170 20	71 63	241 83
20	Repairs of bridges and trestles	69,564 09	.0546	133 71	56 27	189 98
21	Repairs of buildings	7,467 89	.0058	14 20	5 98	20 18
22	Superintendence & gen. expense	8,152 73	.0064	15 67	6 60	22 27
23	Law expenses	5,369 85	.0042	10 29	4 33	14 62
24	Stationery and printing	10,669 09	.0084	20 57	8 66	29 23
25	Rent account	42,690 79	.0335	82 04	34 52	116 56
26	Extraordinary expenses	1,921 97	.0015	3 67	1 55	5 22
27	Insurance	181 59	.0001	25	10	35
28	Construction account	217,003 68	.1702	416 81	175 41	592 22
29	Taxes	15,474 98	.0122	29 88	12 57	42 45
30	Freight proportion on basis of earnings charged to Cincinnati div. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	31,735 04	.0248	60 73	25 56	86 29
		1,157,654 22	.9081	2,223 86	935 90	3,159 76

Total cost of carrying freight on Cincinnati div., $1,157,654.22, divided by 127,471,717, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .9081 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	244,892	.9081	2,223 86	6,582 81	4,358 95
Freight going to or over Nor. div. of the C. & O. R. R.	103,061	.9081	935 90	3,874 82	2,938 92
Total	347,953		3,159 76	10,457 63	7,297 87

201 Net earnings derived by Lexington br'ch of L., C. & L. railroad on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1890—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Passenger operating expenses.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	1,544 83	.0212	1 63	1 93	3 56
2	Engineers, firemen, conductors, brakemen, etc.	18,249 79	.2501	19 23	22 73	41 96
3	Hire of engines and cars	3,081 90	.0422	3 25	3 83	7 08
4	Employees killed or injured	1,440 34	.0197	1 51	1 79	3 30
5	Individuals killed or injured	68 18	.0009	07	08	15
6	Loss or damage to baggage	4 25	.0001	01	01	02
7	Damage to property					
8	Stock killed or injured	2,307 15	.0316	2 43	2 87	5 30
9	Expense at stations	7,927 23	.1086	8 35	9 87	18 22
10	Locomotive repairs	6,807 14	.0933	7 17	8 48	15 65
11	Round-house expenses	2,708 29	.0371	2 85	3 37	6 22
12	Supplies for locomotives	12,996 15	.1781	13 70	16 18	29 88
13	Telegraph expenses and repairs	2,248 75	.0308	2 37	2 80	5 17
14	Sleeping-car hire	2,308 04	.0316	2 43	2 87	5 30
15	Sleeping-car expenses	412 42	.0057	44	52	96
16	Train expenses	5,021 04	.0688	5 29	6 25	11 54
17	Car repairs, pass., bag., & express	7,234 09	.0991	7 62	9 01	16 63
18	Sleeping-car repairs					
19	Repairs of roadway	21,514 13	.2948	22 67	26 79	49 46
20	Repairs of bridges and trestles	440 84	.0060	46	54	1 00
21	Repairs of buildings	1,472 63	.0202	1 55	1 84	3 39
22	Superintendence & gen. expense	1,955 05	.0268	2 06	2 44	4 50
23	Law expenses	585 48	.0080	62	73	1 35
24	Stationery and printing	1,951 66	.0267	2 05	2 43	4 48
25	Rent account	466 40	.0064	49	58	1 07
26	Extraordinary expenses	244 56	.0034	26	31	57
27	Insurance					
28	Construction account	3,755 03	.0515	3 96	4 68	8 64
29	Taxes	5,670 46	.0777	5 98	7 06	13 84
30	Passenger proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	8,229 84	.1128	8 67	10 25	18 92
		120,645 67	1.6532	127 12	150 24	277 36

Total cost of carrying passengers on Lexington branch, $120,645.67, divided by 7,297,371, the number of passengers carried one mile, gives, as the average cost per passenger per mile, 1.6532 cents.

Recapitulation.

	Number passenger-carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passenger- coming from or over Nor. div. of the C. & O. R. R.	7,689	1.6532	127 12	177 77	50 65
Passenger- going to or over Nor. div. of the C. & O. R. R.	9,088	1.6532	150 24	182 45	32 21
Total	16,777		277 36	360 22	82 86

202 Net earnings derived by Lexington branch of L., C. & L. railroad on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for year ended June 30, 1890—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Freight operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	2,513 80	.0169	1 26	1 24	2 50
2	Engineers, firemen, conductors, brakemen, etc	19,496 61	.1308	9 77	9 66	19 43
3	Hire of engines and cars	452 49	.0030	22	22	44
4	Employees killed or injured	7,073 35	.0474	3 54	3 50	7 04
5	Individuals killed or injured	88 41	.0006	04	04	08
6	Loss or damage to freight	1,732 81	.0116	87	85	1 72
7	Damage to property					
8	Stock killed or injured	827 89	.0055	41	41	82
9	Expense at stations	19,939 51	.1338	10 00	9 89	19 89
10	Locomotive repairs	6,547 91	.0440	3 29	3 25	6 54
11	Round-house expenses	2,043 69	.0137	1 02	1 01	2 03
12	Supplies for locomotives	10,969 09	.0736	5 50	5 43	10 93
13	Telegraph expenses and repairs	1,372 25	.0092	69	68	1 37
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	3,710 15	.0250	1 87	1 84	3 71
17	Car repairs, freight	12,172 26	.0817	6 10	6 04	12 14
18	Sleeping-car repairs					
19	Repairs of roadway	13,128 61	.0881	6 58	6 51	13 09
20	Repairs of bridges and trestles	269 01	.0018	13	13	26
21	Repairs of buildings	898 63	.0060	45	45	90
22	Superintendence & gen'l expense	2,752 55	.0184	1 38	1 35	2 73
23	Law expenses	357 23	.0024	18	18	36
24	Stationery and printing	1,190 97	.0080	60	59	1 19
25	Rent account	284 60	.0019	14	14	28
26	Extraordinary expenses	149 24	.0010	08	08	16
27	Insurance					
28	Construction account	2,291 71	.0154	1 15	1 14	2 29
29	Taxes	3,460 71	.0232	1 73	1 72	3 45
30	Freight proportion on basis of earnings charged to Lexington branch of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	6,277 95	.0421	3 15	3 10	6 25
		120,001 43	.8051	60 15	59 45	119 60

Total cost of carrying freight on Lexington branch, $120,001.43, divided by 14,905,083, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, .8051 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	7,471	.8051	60 15	205 84	145 69
Freight going to or over Nor. div. of the C. & O. R. R.	7,384	.8051	59 45	147 56	88 11
Total	14,855	.....	119 60	353 40	233 80

203 Net earnings derived by Shelby R. R. on passengers coming from or over the Northern division of the Cumberland & Ohio railroad and on passengers going to or over the Northern division of the Cumberland & Ohio railroad for the year ended June 30, 1890—arrived at on basis of cost per passenger per mile, with the passenger proportion of all expenses included.

No.	Accounts.	Operating expenses—passenger.	Average cost per passenger per mile.	Cost of carrying passengers— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting	22 40	.0031	3 26	3 01	6 27
2	Engineers, firemen, conductors, brakemen, etc.	1,484 81	.2046	215 21	198 78	413 99
3	Hire of engines and cars	931 57	.1284	135 06	124 73	259 79
4	Employees killed or injured	118 38	.0163	17 15	15 83	32 98
5	Individuals killed or injured	11 88	.0017	1 79	1 65	3 44
6	Loss or damage to baggage	20 54	.0028	2 95	2 72	5 67
7	Damage to property	2 44	.0003	31	29	60
8	Stock killed or injured	159 13	.0219	23 04	21 27	44 31
9	Expense at stations	593 74	.0818	86 04	79 46	165 50
10	Locomotive repairs	490 04	.0675	71 00	65 57	136 57
11	Round-house expenses	204 18	.0281	29 56	27 29	56 85
12	Supplies for locomotives	844 63	.1164	122 44	113 08	235 52
13	Telegraph expenses & repairs	371 90	.0512	53 86	49 73	103 59
14	Sleeping-car hire					
15	Sleeping-car expenses					
16	Train expenses	822 74	.1134	119 28	110 16	229 44
17	Car repairs—pass., bag., & express.	815 16	.1123	118 13	109 09	227 22
18	Sleeping-car repairs					
19	Repairs of roadway	4,317 67	.5949	625 76	577 90	1,203 66
20	Repairs of bridges & trestles	629 81	.0868	91 30	84 32	175 62
21	Repairs of buildings	89 25	.0123	12 94	11 95	24 89
22	Superintendence & gen. expense	185 19	.0255	26 82	24 77	51 59
23	Law expenses	147 40	.0203	21 35	19 72	41 07
24	Stationery and printing	154 95	.0214	22 51	20 79	43 30
25	Rent account	6,222 83	.8574	901 87	832 91	1,734 78
26	Extraordinary expenses	2 08	.0003	31	29	60
27	Insurance					
28	Construction acc't					
29	Taxes					
30	Passenger proportion on basis of earnings charged to Shelby R. R. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	545 52	.0752	79 10	73 05	152 15
		19,188 24	2.6439	2.781 04	2.568 36	5.349 40

Total cost of carrying passengers on Shelby R. R., $19,188.24, divided by 725,739, the number of passengers carried one mile, gives, as the average cost per passengers per mile, 2.6439 cents.

Recapitulation.

	Number passengers carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Passengers coming from or over Nor. div. of the C. & O. R. R.	105,187	2.6439	2,781 04	2,836 14	55 10
Passengers going to or over Nor. div. of the C. & O. R. R.	97,143	2.6439	2,568 34	2,736 75	168 39
Total	202,330		5,349 40	5,572 89	223 49

204 Net earnings derived by Shelby R. R. on freight coming from or over the Northern division of the Cumberland & Ohio railroad and on freight going to or over the Northern division of the Cumberland & Ohio railroad for the year ended June 30, 1890—arrived at on basis of cost per ton of freight per mile, with the freight proportion of all expenses included.

No.	Accounts.	Operating expenses.	Average cost per ton per mile.	Cost of carrying freight— Coming from or over Nor. division, C. & O. R. R.	Going to or over Nor. division, C. & O. R. R.	Total both directions.
1	Advertising and soliciting					
2	Engineers, firemen, conductors, brakemen, etc	1,873 64	.2710	532 47	383 98	916 45
3	Hire of engines and cars	1,109 71	.1605	315 36	227 41	542 77
4	Employees killed or injured	118 38	.0171	33 60	24 23	57 83
5	Individuals killed or injured	11 88	.0017	3 34	2 41	5 75
6	Loss or damage to freight	126 85	.0183	35 96	25 92	61 88
7	Damage to property	3 56	.0005	98	71	1 69
8	Stock killed or injured	62 49	.0090	17 69	12 74	30 43
9	Expense at stations	1,285 59	.1859	365 26	263 40	628 66
10	Locomotive repairs	713 98	.1033	202 97	146 36	349 33
11	Round-house expenses	297 50	.0430	84 49	60 93	145 42
12	Supplies for locomotives	1,230 63	.1780	349 74	252 21	601 95
13	Telegraph expenses & repairs	541 86	.0784	154 04	111 09	265 13
14	Sleeping car hire					
15	Sleeping-car expenses					
16	Train expenses	746 55	.1080	212 20	153 03	365 23
17	Car repairs, freight	707 98	.1024	201 20	145 09	346 29
18	Sleeping-car repairs					
19	Repairs of roadway	6,285 76	.9090	1,786 02	1,287 97	3,073 99
20	Repairs of bridges & trestles	917 63	.1327	260 73	188 02	448 75
21	Repairs of buildings	130 03	.0188	36 94	26 64	63 58
22	Superintendence & general expense	269 83	.0390	76 63	55 26	131 89
23	Law expenses	214 75	.0311	61 11	44 06	105 17
24	Stationery and printing	225 76	.0326	64 06	46 18	110 24
25	Rent account	9,066 67	1.3112	2,576 27	1,857 86	4,434 13
26	Extraordinary expenses	3 03	.0004	79	56	1 35
27	Insurance					
28	Construction acc't					
29	Taxes					
30	Freight proportion on basis of earnings charged to Shelby R. R. of L., C. & L. R. R. of expenses incurred for the benefit of all parts of the L. & N. R. R. system	794 83	.1150	225 96	162 94	388 90
		26,738 89	3.8669	7,597 81	5,479 00	13,076 81

Total cost of carrying freight on Shelby R. R., $26,738.89, divided by 691,468, the number of tons of freight carried one mile, gives, as the average cost per ton per mile, 3.8669 cents.

Recapitulation.

	Number tons carried one mile.	Average cost.	Cost.	Revenue.	Net revenue.
Freight coming from or over Nor. div. of the C. & O. R. R.	196,482	3.8669	7,597 81	6,563 95	*1,033 86
Freight going to or over Nor. div. of the C. & O. R. R.	141,689	3.866.9	5,479 00	4,826 33	*652 67
Total	338,171		13,076 81	11,390 28	*1,686 53

205 Jefferson Circuit Court, Law and Equity Division, 30th Judicial District of Kentucky.

A. L. SCHMIDT, Trustee, Plaintiff,
vs.
THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Company, Defendant. } Order.

At a court held for the court aforesaid on the 24th day of April, 1893—

On motion of defendant, by counsel, it is ordered by the court that the order of reference entered herein March 19th, 1891, is amended so as to direct the special commissioner:

First. To ascertain and report *firther* the Northern division of the Cumberland and Ohio Railroad Company has since its completion earned its operating expenses; and, if it has not, to report the amount of the deficit in this respect for each year.

Second. To ascertain and report further the earnings as between the Louisville, Cincinnati and Lexington Railroad Company and the Northern division of the Cumberland and Ohio Railroad Company have been properly distributed, and, if there has been any error in this respect, to report wherein the said error consists.

206 Third. The commissioner is further directed that in showing the net profits on the lines of the Louisville, Cincinnati & Lexington and Shelby railroad *and* must show separately the profits accruing to the Shelby railroad and the Louisville, Cincinnati and Lexington railway from freight and passengers coming from or over the Northern division of the Cumberland & Ohio railroad, and the profits accruing to the Louisville, Cincinnati and Lexington railway and the Shelby railroad on freight and passengers going to the Cumberland and Ohio Northern division from or over either the Shelby railroad or the Louisville, Cincinnati & Lexington railway.

This order is entered, *nunc pro tunc*, as of May 6th, 1891.

A copy.

Attest: JOHN S. CAIN, *Clerk*,
By ALBERT S. RAU, *D. C.*

At a court held for the court aforesaid on the 8th day of February, 1892—

Came defendants, by counsel, and filed exceptions to commissioner's report herein.

And, on its motion, leave is given until 22nd inst. to file additional exceptions herein.

Said exceptions are in words and figures following, to wit:

Louisville Law and Equity Court.

A. L. SCHMIDT, Trustee, &c., Plaintiff,
vs.
207 LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY, Defendant.

Exceptions to the Report of the Special Commissioner.

The defendant, The Louisville, Cincinnati & Lexington Railway Company, excepts to the report of the special commissioner herein, and alleges that it is erroneous:

1. In finding by statement No. 4 that the defendant made a profit from the business coming to it and the Shelby railroad from and over the Northern division of the Cumberland & Ohio road and on business going from it and the Shelby railroad to the Northern division of the Cumberland and Ohio road.

No such profit was made nor could such profit have been made until all the operating expenses on the said Northern division of the Cumberland & Ohio railroad had been paid and the gross receipts of the said Northern division of said Cumberland & Ohio railroad were less than the actual cost of operating said road by a sum largely in excess of the largest amount of profit found by the special commissioner to have been made by the defendant, and the net deficit in a payment of the operating expenses of the said Northern division of the Cumberland and Ohio railroad is largely in excess of the profit to defendant as shown by said report.

Statement No. 6 is likewise erroneous for the same reason, and is objected to and excepted to on that account.

2. In ascertaining the profit by the defendant it was erro-
208 neous to take into account the business going from defendant's line and the Shelby railroad to the Northern division of the Cumberland & Ohio road. The inquiry should have been limited to business coming to it from and over the line of the Northern division of the Cumberland & Ohio railroad, and in this respect statements Nos. 5, 6, 7, 8, & 9 are likewise erroneous, and are objected to and excepted to on that ground.

3. In ascertaining the cost to the defendant of transacting business coming to it and the Shelby railroad from and over the Northern division of the Cumberland & Ohio road and the business going from said lines to said Northern division of the said Cumberland and Ohio railroad, the commissioner assumed that such business could have been done at the same average cost per tone per mile as the total business on the line of the defendant. This was erroneous. Such business was not and cannot be done at a less average cost than three cents per tone per mile, and the commissioner erred in not taking that as an average cost of doing such business.

4. The commissioner erred in not distributing joint receipts from business on the Northern division of the Cumberland & Ohio, and the defendant's local business allowing the Northern division of the Cumberland & Ohio a constructive or arbitrary mileage or average

haul of at least 60 miles, and in that respect statements 5, 6, & 7 are likewise erroneous and are objected to and excepted to on that account.

5. The commissioner in statement No. 4, as well as in all other statements, erred in not allowing as part of the cost of doing
209 the business aforesaid the amount paid as interest on the bonded indebtedness of defendant's line apportioned to that particular business, as shown by the report, but not allowed by the commissioner as part of the cost of operation.

The defendant says that the statement 9 modified by allowing as part of the cost of operation the proportion of the interest properly chargeable to that business, as shown by the report, and by limiting the inquiry to the profits from the business coming to the line of defendant from and over the line of the Northern division of the Cumberland and Ohio is closest to correct, and it moves the adoption by the court of that as herein indicated.

HELM & BRUCE,
Att'ys for Def't.

At a court held for the court aforesaid on the 21st day of March, 1892—

Came plaintiffs, by counsel, and moved the court to correct the order entered herein of February 1st, 1892, and to set aside so much thereof as recites or permits the filing of the report of R. E. Sewell herein as special commissioner because—

Said R. E. Sewell is not and never has been a special commissioner in this action, and moved the court to correct said order, so as to show that said report was filed by said R. E. Sewell in his individual capacity and not as an officer of this court.

To which defendant, by counsel, objects, and said motion
210 is assigned to the 24th inst. for hearing.

At a court held for the court aforesaid on the 22nd day of March, 1892—

The court being advised, it is ordered that so much of the order heretofore entered as recites that R. E. Sewell, as special commissioner, filed his report is set aside.

And now comes the parties and consent that said report may be considered as if made by regular commissioner, and said exceptions will be accordingly filed.

At a court held for the court aforesaid on the 11th day of April, 1892—

This day came plaintiffs and filed herein exceptions to the report and statement of R. E. Sewell filed herein on February 1st, 1892, and filed exceptions to the depositions of M. H. Smith and Albert Fink taken in this action in behalf of defendants, and, by consent of parties, this action is assigned for hearing to April 21st, 1892, upon exceptions to the report and statement of R. E. Sewell herein referred to and upon exceptions filed by plaintiff- to depositions of M. H. Smith and Albert Fink. By consent of parties leave is given to all parties to take proof and to re-examine and cross-examine

witnesses upon oral examination on notice to counsel until April 21st, 1892.

Said exceptions are in words and figures following, to wit:

211 Louisville Law and Equity Court.

A. L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO. & Others, Defendants.

The plaintiffs except to each and all the questions and answers of the depositions of M. H. Smith and Albert Fink, because they are each and all irrelevant and incompetent.

SIMRALL & BODLEY,
Att'ys for Plaintiffs.

At a court held for the court aforesaid on the 21st day of April, 1892—

Ordered that this action be, and is hereby, postponed until the 26th inst. for hearing, with leave to all parties to take proof.

At a court held for the court aforesaid on the 26th day of April, 1892—

Came the parties, by counsel, and by consent this action is postponed until the 27th inst.

At a court held for the court aforesaid on the 27th day of April, 1892—

212 Came plaintiffs, by counsel, and moved the court to set aside the order of March 9, '91, and further moved the court to confirm the first report of R. E. Sewell, No. 1, made in pursuance of the instructions and order of court of 25th February, '90.

To which defendant objects.

Came the parties hereto and agree that the evidence herein may be read subject to legal exceptions for competency and relevency, and as to such exceptions it is agreed that it shall be considered as if they were specifically made to all incompetent and irrelevant evidence.

This day came plaintiffs, by attorneys, and produced a paper showing the proportion of business coming from or over the lines of the Cumberland and Ohio Railroad Company, Northern division, to the Louisville, Cincinnati & Lexington Railway Company, to the cities of Louisville, Cincinnati, and Lexington, and said paper was ordered to be, and was, filed, and by agreement said paper was made and read as a supplemental report by R. E. Sewell, the auditor of defendant.

And this action, having been heard on the motion of plaintiff- to set aside the order of March 9, 1891, and to confirm the 1st report of R. E. Sewell, No. 1, was submitted, and the court, not being advised, takes time.

The following is the paper referred to in the foregoing order:

213 *Statement Showing the Percentage that the Business Between Louisville and Points on the Northern Division of the Cumberland and Ohio R. R. Bears to the Total Business Between Points on the Northern Division of the Cumberland & Ohio R. R. and Points on the Shelby R. R. and Cincinnati Division and Lexington Branch of the Louisville, Cincinnati & Lexington R. R. Co.; also Similar Percentages for Cincinnati, O. & Lexington, Ky.*

Freight.

		June, 1883.	July 1st, '83–July 1st, '84.	July 1st, '84–July 1st, '85.	July 1st, '85–July 1st, '86.	July 1st, '86–July 1st, '87.	July 1st, '87–July 1st, '88.	July 1st, '88–July 1st, '89.	July 1st, '89–July 1st, '90.
From Northern div., C. & O. R. R.	To Louisville	36 94	74 83	76 01	78 15	86 04	75 37	80 84	83 55
	Cincinnati	36	1 20	75	34	1 00	83	78	1 62
	Lexington	1 46	1 05	3 84	3 59	90	1 25	1 40	53
To Northern div., C. & O. R. R.	From Louisville	93 53	89 95	95 74	97 12	90 76	93 93	95 22	95 48
	Cincinnati	1 94	2 79	92	1 29	1 23	2 09	1 99	2 24
	Lexington	.....	98	76	40	17	60	42	08

Passengers.

From Northern div., C. & O. R. R.	To Louisville	82 94	88 00	90 94	89 55	85 99	85 49	86 84	85 82
	Cincinnati	27	50	27	40	66	1 16	1 28	44
	Lexington	2 22	1 57	41	77	13	1 88	1 87	1 45
To Northern div., C. & O. R. R.	From Louisville	77 01	83 01	81 93	83 83	81 17	84 55	88 12	85 12
	Cincinnati	30	19	30	33	26	37	60	25
	Lexington	2 09	1 85	1 30	2 83	2 06	1 65	1 50	1 82

(This report is filed on page 44, vol. #1.)

214 At a court held for the court aforesaid on the 9th day of May, 1892—

The court, being now advised, delivered a written opinion herein which is ordered to be and is now filed.

Said opinion is in words and figures following, to wit:

L. L. & E. Court.

A. L. SCHMIDT ET AL.
vs.
L., C. & L. R. *C.* Co.

There is no occasion, reason, or principle for the application of arbitraries upon the statement of the accounts in this case.

There is no contract on the subject between the parties, and neither the court nor the commissioner is at liberty to make an arbitrary adjustment upon such a basis. Mr. Smith testifies that it is a matter of contract. Dep., p. 4.

The primary obligations in operating the C. & O.—that is, its operating expenses—must be first deducted before the earnings accruing to the L., C. & L. from that enterprise could be dedicated under the contract lien to the payment of interest on the bonds. This is apparent from the terms and objects of the lease & mortgage, which, for the purpose of determining the rights of the parties to this controversy, must be considered as one instrument.

On the question of the proper method of arriving at the profits of the L., C. & L. on business coming to it from and over
215 the Northern division of the C. & O., I have carefully considered the facts and language of the court of appeals in the case of Cochran & Fulton *vs.* Atherton and have re-examined the cases of St. John *vs.* Erie R'y Co., 22 Wal., 136, & The U. P. R'y *vs.* U. S., 99 U. S., 420, & The U. S. *vs.* Kansas P. R'y Co., 9 Otto, 455, & Taft *vs.* R. R'd, 8 R. I. 310, and Bates *vs.* Androscoggin R. R. Co., 49 Me., 491, & Pullan *vs.* C. & C. R. R., 5 Biss., 237.

I have devoted much time, over a day, to the reconsideration of these authorities and to the study of this very important question in this case. My convictions on the question as to what is the correct method and principle to be adopted in ascertaining the net earnings in lien are the same as are set forth at length in the opinion rendered in this case on the 9th of March, 1891, on this subject. The authorities above cited sustain this view of the law, and I must decline to depart from the principle as announced in the former opinion of the court on this point, endorsing the report of Commissioner Sewell, marked R. E. S. No. 2.

In the former rulings of this court on exceptions to the commissioner's report the court held that the bondholders were entitled to the net earnings of the L., C. & L. *Rw. Co.* on business coming to it from or over the lines of the Northern division of the Cumberland & Ohio R. R'd Co. *in both directions*—that is, to the net earnings on business coming to the L., C. & L. Rw. Co. from or over the lines of the Northern division of the Cumberland and Ohio R. R'd Co. and also to the net earnings on business
216 going from the L., C. & L. Rw. Co. over the lines of said C. & O. R. R'd Co.—in other words, to all the net earnings accruing

to or derived by the L., C. & L. Rw. Co. on account of business done on the lines of the C. & O. R. R'd Co. in either direction & both directions. The contract between the L., C. & L. Rw. Co. and the bondholders under the mortgage trust deed made to Speed, trustee, the meaning of which is in dispute, is in the following words: If all sources of receiving money of said Northern division of the Cumberland & Ohio R'way Co. failed to provide for the interest & the sinking fund, then said 1st party (the L., C. & L. Rw. Co.) shall supply the deficiency, so far as the same may be done, by appropriating the net earnings or so much thereof as may be needed on its own lines, which may accrue to it by reason of business coming to it from — over the said line of the said Northern division of the Cumberland & Ohio R. R. Company."

The *ph-aseology* of this clause of the contract is singularly obscure and ambiguous. The question is what was meant by the parties by the expression occurring — the clause of the contract just quoted, "net earnings * * * which may accrue to it (the L., C. & L. R. Co.) by reason of business coming to it from or over the line of the said Northern division of the Cumberland & Ohio R. R'd Co."

Two thoughts are suggested in the sentence last quoted, to wit,
"1st, the *net earnings* which might accrue or arise or result or be realized by the L., C. & L. R. R. Co. from a certain source;
217 and, 2nd, the source itself of said earnings. It cannot be said of "net earnings" or "the accrual of earning" that the idea of locomotion is at all involved nor is topographical direction involved in the expression "earnings that may accrue to it." But can this be said of the latter portion of the sentence which suggests the second thought, namely, "by reason of business coming to it from or over the line of the said Northern division of the C. & O. R. Co.?" Net earnings accruing to a R. R'd Co. do not impart direction, motion, or topography; but business coming *to* one railr'd from or over the line of another railroad, and a connecting line at that, it would seem necessarily signifies both direction and motion. The net earnings accrued to the intangible corporation which has only a theoretic or ideal *habutal* in the state of its creation, while the *business* coming to one R. R'd *form* & *over* the line of another railroad and a connecting line, out of which the net earnings accrue, meaning the transportation of passengers & freight, does necsarily involve, it seems to me, both motion and direction in the movement of said business. The word "coming," when applied to *business* from & over the line of one railroad to another railroad, does, it would seem, carry with it both the idea of motion and direction and signifies first the opposite of "going." I confess I had not analyzed the phraseology of the clause of the contract quoted with sufficient care on the former rulings.

218 The words "coming from," when applied to incorporeal things, to intangible subjects of which locality and direction cannot be predicated, do not imply motion or direction, but when applied to the subject-matter of railroad traffic, to *business* coming from or over the line of one railroad to another, they do imply *necessarily* motion and one direction—that is, from the former to the latter line of railroad.

The net earnings accrue or arise from the business; the business *comes from or over* the C. & O. line to the L., C. & L. R'd, in contradistinction and in opposition to business going from and over the L., C. & L. R'd line to the line of the C. & O.

If this is not the meaning of the clause of the contract in dispute, when attentively considered, the least that can be said of it is that it has both the meanings contended for by learned counsel on either side, or rather is susceptible of ths two meanings, and that it is doubtful on the face of the contract which meaning was intended. In such an event there can be no doubt, I apprehend, of the admissibility of extrinsic evidence of the circumstances under which the contract was made, and *if* the usual signification attached to such expressions by persons engaged in the particular business, "that of railroading," in which the parties making the contract under consideration were engaged, in order to show the intention of the parties and which of the meanings was contemplated by them should be conveyed by the terms employed. It is a case, to say the least of it, of a latent ambiguity, which, in the language of Ld. Bacon, may be "holpen by averment."

219 Under the light of the circumstances of the case and of the usual and appropriate meaning of the words of the contract when employed by persons engaged in railroading and making contracts between railroad companies, it is conceived that there can be no doubt of the meaning and intention of the parties to the contract under consideration, and that it was that only the net earnings were put in lien which accrued to the L., C. & L. R. Rw. Co. on business *coming* (in contradistinction to going) to it *from* (as indicating direction) or over the Northern division of the C. & O. R. R'd, not in both directions as formerly ruled, but only in one direction. Since former ruling of the court was entered the depositions of experts in railroading have been taken as to the meaning of the terms used in the contract in the parlance of railroadmen, whose dealings in such matters *which* I consider entirely compeentt & admissible evidence. The exceptions to the depositions of these railroad experts, Mr. Fink, Smith, & others, on the subject of the usual meaning of such phrases as there in dispute in the contract under consideration are overruled. The exceptions to the rest of the depositions sustained. The report of the commissioner in conformity with these views is sustained. The report or reports inconsistent therewith are overruled. Let a judg't be prepared accordingly, reserving exceptions to both sides.

STERLING B. TONEY, *Judge.*

At a court held for the court aforesaid on the 23rd day of May, 1892—

220 This action having been set at rules on 16th inst—

On motion of plaintiff- the statement of the commissioner ordered to be filed herein Dec. 5, 1887, is now filed *nunc pro tunc* as of Dec. 5, 1887.

And this action, having been heard, was submitted, and the court, not being advised, takes time.

The following is the report referred to in the foregoing order:

221 Recapitulation of net earnings from both passenger and freight accruing to Cincinnati div. and Lexington branch of the L., C. & L. R'y & Shelby railroad for June, 1883, and fiscal years 1883–1884 to 1889–'90, inclusive.

Recapitulation, page 7.

		Coming from or over the Nor. div. of the C. & O. R. R.	Going to or over the Nor. div. of the C. & O. R. R.	Total both directions.
June, 1883—one month.				
Cincinnati div.	Passenger	33 31	16 08	49 39
	Freight	591 75	170 58	762 33
		625 06	186 66	811 72
Lexington branch	Passenger	7 46	3 20	10 66
	Freight	10 68	10 34	21 02
		18 14	13 54	31 68
Shelby R. R.	Passenger	36 02	20 32	56 34
	Freight	*77 79	93 65	15 86
		*41 77	113 97	72 20
	Total	601 43	314 17	915 60
1883–'84 - one year.				
Cincinnati div.	Passenger	864 93	504 22	1,369 15
	Freight	4,494 35	2,405 41	6,899 76
		5,359 28	2,909 63	8,268 91
Lexington br'ch	Passenger	123 70	86 34	210 04
	Freight	499 52	162 87	662 39
		623 22	247 21	872 43
Shelby R. R.	Passenger	539 31	368 52	907 83
	Freight	*770 87	343 21	*427 66
		*231 56	711 73	480 17
	Total	5,750 94	3,870 57	9,621 51
1884–'85—one year.				
Cincinnati div.	Passenger	112 66	506 82	619 48
	Freight	4,579 80	2,823 91	7,403 71
		4,692 46	3,330 73	8,023 19
Lexington br'ch	Passenger	37 32	57 26	94 58
	Freight	501 09	186 65	687 74
		538 41	243 91	782 32

* Loss.

Recapitulation of Net Earnings, etc.—Continued.

		Coming from or over the Nor. div. of the C. & O. R. R.	Going to or over the Nor. div. of the C. & O. R. R.	Total both directions.
Shelby R. R.	Passenger	*761 79	286 07	*475 72
	Freight	431 99	777 77	1,209 76
		*329 80	1,063 84	734 04
	Total	4,901 07	4,638 43	9,539 55
1885-'86—one year.				
Cincinnati div.	Passenger	56 64	360 26	416 90
	Freight	3,527 34	2,712 22	6,239 56
		3,583 98	3,072 48	6,656 46
Lexington br'ch	Passenger	68 34	28 89	97 23
	Freight	223 06	88 72	311 78
		291 40	117 61	409 01
Shelby R. R.	Passenger	*387 96	278 28	*109 68
	Freight	*1,102 11	516 51	*585 60
		*1,490 07	794 79	*695 28
		2,385 30	3,994 88	6,370 19
1886-'87—one year.				
Cincinnati div.	Passenger	537 76	465 02	1,002 78
	Freight	5,993 97	2,798 30	8,792 27
		6,531 73	3,263 32	9,795 45
Lexington br'ch	Passenger	87 38	76 44	163 82
	Freight	117 52	220 80	338 32
		204 90	297 24	502 14
Shelby R. R.	Passenger	361 70	330 35	692 05
	Freight	1,513 71	1,336 59	2,850 30
		1,875 41	1,666 94	3,542 35
		8,612 04	5,221 50	13,839 54
222 1887-'88—one year.				
Cincinnati div.	Passenger	380 06	435 28	815 34
	Freight	4,343 03	2,668 11	7,011 14
		4,723 09	3,103 39	7,826 48
Lexington branch	Passenger	98 98	91 30	190 28
	Freight	126 26	124 11	250 37
		225 24	215 41	440 65

* Loss.

Recapitulation of Net Earnings, etc.—Continued

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of C. & O. R. R.	Total both directions.
Shelby R. R.	Passenger	*400 46	*200 02	*600 48
	Freight	*321 88	989 10	667 22
		*722 34	789 08	66 74
	Total	4,225 99	4,107 88	8,333 87
1888-'89—one year.				
Cincinnati div.	Passenger	215 68	313 16	528 84
	Freight	4,356 52	2,257 67	6,614 19
		4,572 20	2,270 83	7,143 03
Lexington div.	Passenger	86 64	53 11	139 75
	Freight	389 87	127 90	517 77
		476 51	181 01	657 52
Shelby R. R.	Passenger	*631 41	*450 90	*1,082 31
	Freight	*4,645 05	*3,149 90	*7,794 95
		*5,276 46	*3,600 80	*8,877 26
	Total	*227 75	*848 96	*1,076 71
1889-'90—one year.				
Cincinnati div.	Passenger	*111 92	*17 50	*129 42
	Freight	4,358 95	2,938 92	7,297 87
		4,257 03	2,921 42	7,168 45
	Passenger	50 65	32 20	82 86
	Freight	145 69	88 11	233 80
		196 34	120 32	316 66
	Passenger	55 10	168 39	223 49
	Freight	*1,033 86	*652 67	*1,686 53
		*978 76	*484 28	*1,463 04
	Total	3,464 61	2,557 46	6,022 07

* Loss.

Recapitulation of net earnings from both passenger and freight accruing to Cincinnati div. and Lexington branch of the L., C. & L. R'y & Shelby R. R. for seven (7) years and one (1) month (June 1st, 1883, to June 30th, 1890).

Cincinnati div.	Passenger	2,089 12	2,583 34	4,672 46
	Freight	32,245 71	18,775 12	51,020 83
		34,334 83	21,358 46	55,693 29
Lexington branch	Passenger	*1,189 49	801 01	*388 48
	Freight	*6,005 86	254 26	*5,751 60
		7,195 35	1,055 27	*6,140 08
	Total	29,713 64	23,851 98	53,565 62
Total net earnings accruing to Cincinnati div., Lexington br., & Shelby R. R., June 1st, 1883, to June 30th, 1890	Passenger	1,460 10	3,813 10	5,273 20
	Freight	28,253 54	20,038 88	48,292 42
		29,713 64	23,851 98	53,565 62

223 R. E. S. No. 5.

Statement of net earnings derived by the L., C. & — R'y and Shelby R. R. on business coming from or going to the Northern div. of Cumb. and Ohio R. R. as arrived at by distributing the earnings on actual mileage and estimating the expenses on the L., C. & L. R'y at 3c. per ton per mile.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over the Nor. div. of C. & O. R. R.	Total both directions.
June, 1883—one month.				
Cincinnati div.	Passenger	33 31	16 08	49 39
	Freight	*358 06	94 60	*263 46
		*324 75	110 68	*214 07
Lexington branch	Passenger	7 46	3 20	10 66
	Freight	*3 95	1 37	*2 58
		3 51	4 57	8 08
Shelby R. R.	Passenger	36 02	20 32	56 34
	Freight	*77 79	93 65	15 86
		*41 77	113 97	72 20
	Total	*363 11	229 22	*133 79
1883-'84—one year.				
Cincinnati div.	Passenger	864 93	504 22	1,369 15
	Freight	*1,776 05	815 58	*960 47
		*911 12	1,319 80	408 68

* Loss.

R. E. S. No. 5—Continued.

		Coming from or over the Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
Lexington br'ch	Passenger	123 70	86 34	210 04
	Freight	*147 14	*17 49	*164 63
		*23 44	68 85	45 41
Shelby R. R.	Passenger	539 31	368 52	907 83
	Freight	*770 87	343 21	*427 66
		*231 56	711 73	480 17
	Total	*1,166 12	2,100 38	934 26
1884-'85—one year.				
Cincinnati div.	Passenger	112 66	506 82	619 48
	Freight	*658 87	1,216 01	557 14
		*546 21	1,722 83	1,176 62
Lexington branch	Passenger	37 32	57 26	94 58
	Freight	*449 22	*9 53	*458 75
		*411 90	47 73	*364 17
Shelby R. R.	Passenger	*761 79	286 07	*475 72
	Freight	431 99	777 77	1,209 76
		*329 80	1,063 84	734 04
	Total	*1,287 91	2,834 40	1,546 49
1885-'86—one year.				
Cincinnati div.	Passenger	*56 64	360 26	416 90
	Freight	*1,261 64	974 53	*287 11
		*1,205	1,334 79	129 79
Lexington branch	Passenger	68 34	28 89	97 23
	Freight	*282 20	18 67	*263 53
		*213 86	47 56	*166 30
Shelby R. R.	Passenger	*387 96	278 28	*109 68
	Freight	*1,102 11	516 51	*585 60
		*1,490 07	794 79	*695 28
	Total	*2,908 93	2,177 14	*731 79
1886-'87—one year.				
Cincinnati div.	Passenger	537 76	465 02	1,002 78
	Freight	*727 83	791 91	64 08
		*190 07	1,256 93	1,066 86

* Loss.

R. E. S. No. 5—Continued.

		Coming from or over the Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
Lexington branch	Passenger	87 38	76 44	163 82
	Freight	*147 27	*286 92	*434 19
		*59 89	*210 48	*270 37
Shelby R. R.	Passenger	361 70	330 35	692 05
	Freight	1,513 71	1,336 59	2,850 30
		1,875 41	1,666 94	3,542 35
	Total	1,625 45	2,713 39	4,338 84
224 1887-'88—one year.				
Cincinnati div	Passenger	380 06	435 28	815 34
	Freight	*1,928 32	774 15	*1,154 17
		*1,548 26	1,209 43	*338 83
Lexington branch	Passenger	98 98	91 30	190 28
	Freight	*78 53	*90 95	*169 48
		20 45	35	20 80
Shelby R. R.	Passenger	*400 46	*200 02	*600 48
	Freight	*321 88	989 10	667 22
		*722 34	789 08	66 74
	Total	*2,250 15	1,998 86	*251 29
1888-'89—one year.				
Cincinnati div	Passenger	215 68	313 16	528 84
	Freight	*654 83	44 91	*609 92
		*439 15	358 07	*81 08
Lexington branch	Passenger	86 64	53 11	139 75
	Freight	*190 54	*66 26	*250 80
		*103 54	*13 15	*117 05
Shelby R. R.	Passenger	*631 41	*450 90	*1,082 31
	Freight	*4,645 05	*3,149 90	*7,794 95
		*5,276 46	*3,600 80	*8,877 26
	Total	*5,819 51	*3,255 88	*9,075 39
1889-'90—one year.				
Cincinnati div	Passenger	*111 92	*17 50	*129 42
	Freight	*763 95	782 99	19 04
		*875 87	765 49	*110 38

* Loss.

R. E. S. No. 5—Continued.

		Coming from or over the Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
Lexington branch	Passenger	50 65	32 21	82 86
	Freight	*18 29	*73 96	*92 25
		32 36	*41 75	*9 39
Shelby R. R.	Passenger	55 10	168 39	223 49
	Freight	*1,033 86	*652 67	*1,686 53
		*978 76	*484 28	*1,463 04
	Total	*1,822 27	239 46	*1,582 81

Recapitulation of net earnings from both passenger & freight accruing to Cincinnati div. & Lexington branch of the L., C. & L. R'y and Shelby R. R. for seven (7) years & one (1) month, June 1st, 1883, to June 30th, —.

Cincinnati div	Passenger	2,089 12	2,583 34	4,672 46
	Freight	*8,129 55	5,494 68	*2,634 87
		*6,040 43	8,078 02	2,037 59
Lexington branch	Passenger	560 47	428 75	989 22
	Freight	*1,317 14	*525 07	*1,842 21
		*756 67	*96 32	*852 99
Shelby railroad	Passenger	*1,189 49	801 01	*388 48
	Freight	*6,005 86	254 26	*5,751 60
		*7,195 35	1,055 27	*6,140 08
	Total	*13,992 45	9,036 97	*4,955 48
Total net earnings accruing to Cin. div., Lexington b'ch, & Shelby R. R., June 1st, 1883, to June 30th, 1890.	Passenger	1,460 10	3,813 10	5,273 20
	Freight	*15,452 55	5,223 87	*10,228 68
	Total	*13,992 45	9,036 97	*4,955 48

* Loss.

225 R. E. S. No. 6.

Statement of net earnings derived by the L., C. & L. R'y and Shelby R. R. on business coming from or going to Northern div. of the Cumb. & Ohio R. R. as arrived — by allowing the Northern div. of the C. & O. R. R. an arbitrary of 40 miles haul on freight and estimating the expenses the same as in statement marked R. E. S. No. 4—*i. e.*, by applying the average cost per ton per mile over the L., C. & L. R'y as the cost of moving and handling this freight.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of C. & O. R. R.	Total both directions.
June 1, 1883—one month.				
Cincinnati div.	Passenger	33 31	16 08	49 39
	Freight	426 35	113 50	539 85
		459 66	129 58	589 24
Lexington branch.	Passenger	7 46	3 20	10 66
	Freight	7 77	5 62	13 39
		15 23	8 82	24 05
Shelby R. R	Passenger	36 02	20 32	56 34
	Freight	*173 11	14 25	*158 86
		*137 09	34 57	*102 52
	Total	337 80	172 97	510 77
1883-'84—one year.				
Cincinnati div.	Passenger	864 93	504 22	1,369 15
	Freight	2,748 87	1,572 44	4,321 31
		3,613 80	2,076 66	5,690 46
Lexington branch.	Passenger	123 70	86 34	210 04
	Freight	364 35	116 90	481 25
		488 05	203 24	691 29
Shelby R. R.	Passenger	539 31	368 52	907 83
	Freight	*2,834 03	*803 17	*3,637 20
		*2,294 72	*432 65	*2,729 37
	Total	1,807 13	1,845 25	3,652 38
1884-'85—one year.				
Cincinnati div.	Passenger	112 66	506 82	619 48
	Freight	2,963 09	1,763 78	4,726 87
		3,075 75	2,270 60	5,346 35

* Loss.

R. E. S. No. 6—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
Lexington branch	Passenger	37 32	57 26	94 58
	Freight	361 17	138 23	499 40
		398 49	195 49	593 98
Shelby R. R.	Passenger	*761 79	286 07	*475 72
	Freight	*1,513 40	*471 61	*1,985 01
		*2,275 19	*185 54	*2,460 73
	Total	1,199 05	2,280 55	3,479 60
1885-'86—one year.				
Cincinnati div	Passenger	56 64	360 26	416 90
	Freight	2,435 68	1,824 97	4,260 65
		2,492 32	2,185 23	4,677 55
Lexington branch	Passenger	68 34	28 89	97 23
	Freight	157 85	76 25	234 10
		226 19	105 14	331 33
Shelby R. R.	Passenger	*387 96	278 28	*109 68
	Freight	*2,318 44	*816 67	*3,135 11
		*2,706 40	*538 39	*3,244 79
	Total	12 11	1,751 98	1,764 09
1886-'87—one year.				
Cincinnati div	Passenger	537 76	465 02	1,002 78
	Freight	4,005 19	1,989 03	5,994 22
		4,542 95	2,454 05	6,997
Lexington branch	Passenger	87 38	76 44	163 82
	Freight	93 29	168 73	262 02
		180 67	245 17	425 84
Shelby R. R.	Passenger	361 70	330 35	692 05
	Freight	*1,155 59	*172 33	*1,327 92
		*793 89	158 02	*635 87
	Total	3,929 73	2,857 24	6,876 97
226 1887-'88—one year.				
Cincinnati div	Passengers	380 06	435 28	815 34
	Freight	3,008 67	2,024 44	5,033 11
		3,388 73	2,459 72	5,848 45

* Loss.

R. E. S. No. 6—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
Lexington branch	Passengers	98 98	91 30	190 28
	Freight	100 24	92 93	193 17
		199 22	184 23	383 45
Shelby R. R.	Passengers	*400 46	*200 02	*600 48
	Freight	*1,867 90	*413 67	*2,281 57
		*2,268 36	*613 69	*2,882 05
	Total	1,319 59	2,030 26	3,349 85
1888-'89—one year.				
Cincinnati div.	Passenger	215 68	313 16	528 84
	Freight	2,907 57	1,875 48	4,783 05
		3,123 25	2,188 64	5,311 89
Lexington branch	Passenger	86 64	53 11	139 75
	Freight	304 30	103 36	407 66
		390 94	156 47	547 41
Shelby R. R.	Passenger	*631 41	*450 90	*1,082 31
	Freight	*6,457 59	*4,717 48	*11,175 07
		*7,089	*5,168 38	*12,257 38
	Total	*3,574 81	*2,823 27	*6,398 08
1889-'90—one year.				
Cincinnati div.	Passenger	*111 92	*17 50	*129 42
	Freight	2,861 50	1,901 66	4,763 16
		2,749 58	1,884 16	4,633 74
Lexington branch	Passenger	50 65	32 21	82 86
	Freight	107 52	64 77	172 29
		158 17	96 98	255 15
Shelby R. R.	Passenger	55 10	168 39	223 49
	Freight	*2,878 02	*1,889 99	*4,768 01
		*2,822 92	*1,721 60	*4,544 52
	Total	84 83	259 54	344 37

* Loss.

Recapitulation of net earnings from both passenger & freight accruing to Cincinnati div. & Lexington branch of the L., C. & L. R'y and Shelby R. R. for seven (7) years and one (1) month, June 1st, 1883, to June 30th, 1890.

Cincinnati div.	Passenger ...	2,089 12	2,583 34	4,672 46
	Freight.....	21,356 92	13,065 30	34,422 22
		23,446 04	15,648 64	39,094 68
Lexington branch.	Passenger	560 47	428 75	989 22
	Freight.....	1,496 49	766 79	2,263 28
		2,056 96	1,195 54	3,252 50
Shelby railroad	Passenger	*1,189 49	801 01	*388 48
	Freight.....	*19,198 08	*9,270 67	*28,468 75
		*20,387 57	*8,469 66	*28,857 23
	Total ...	5,115 43	8,374 52	13,489 95
Total net earnings accruing to Cin. div., Lexington b'ch, & Shelby R. R., June 1st, 1883, to June 30th, 1890.	Passenger ...	1,460 10	3,813 10	5,273 20
	Freight.	3,655 33	4,561 42	8,216 75
	Total ...	5,115 43	8,374 52	13,489 95

227 "R. E. S. No. 7."

Statement of net earnings derived by the L., C. & L. R'y and Shelby R. R. on business — from or going to the Northern div. of C. & O. R. R. as arrived at by allowing the Northern division of C. & O. R'y an arbitrary of 40 miles haul on the freight & estimating the expenses at 3c. per ton per mile.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
June, 1883—one month.				
Cincinnati div.	Passenger	33 31	16 08	*49 39
	Freight.....	*523 46	37 52	*485 94
		*490 15	53 60	*436 55
Lexington branch	Passenger ...	7 46	3 20	10 66
	Freight.....	6 86	*3 35	*10 21
		60	*15	45
Shelby R. R.	Passenger ...	36 02	20 32	56 34
	Freight.....	*173 11	14 25	*158 86
		*137 09	34 57	*102 52
	Total....	*626 64	88 02	*538 62

* Loss.

R. E. S. No. 7—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
1883–1884—one year.				
Cincinnati div.	Passenger	864 93	504 22	1,369 15
	Freight	*3,521 53	*17 39	*3,538 92
		*2,656 60	486 83	*2,169 77
Lexington branch	Passenger	123 70	86 34	210 04
	Freight	*282 31	*63 46	*345 77
		*158 61	22 88	*135 73
Shelby R. R.	Passenger	539 31	368 52	907 83
	Freight	*2,834 03	*803 17	*3,637 20
		*2,294 72	*434 65	*2,729 37
	Total	*5,109 93	75 06	*5,034 87
1884–1885—one year.				
Cincinnati div.	Passenger	112 66	506 82	619 48
	Freight	*2,275 58	155 88	*2,119 70
		*2,162 92	662 70	*1,500 22
Lexington branch	Passenger	37 32	57 26	94 58
	Freight	*589 14	*57 95	*647 09
		*551 82	*69	*552 51
		*761 79		
Shelby R. R.	Passenger	*1,513 40	286 07	*475 72
	Freight	*2,275 19	*471 61	*1,985 01
			*185 54	*2,460 73
	Total	*4,989 93	476 47	*4,513
1885–'86—one year.				
Cincinnati div.	Passenger	56 64	360 26	416 90
	Freight	*2,353 30	87 28	*2,266 02
		*2,296 66	447 54	*1,849 12
Lexington branch	Passenger	68 34	28 89	97 23
	Freight	*347 41	6 20	*341 21
		*279 07	35 09	*243 98
Shelby R. R.	Passenger	*387 96	278 28	*109 68
	Freight	*2,318 44	*816 67	*3,135 11
		*2,706 40	*538 39	*3,244 79
	Total	*5,282 13	*55 76	*5,337 89

R. E. S. No. 7—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
1886-'87—one year.				
Cincinnati div.	Passenger	537 76	465 02	1,002 78
	Freight	*2,716 61	*17 36	*2,733 97
		*2,178 85	447 66	*1,731 19
Lexington branch	Passenger	87 38	76 44	163 82
	Freight	*171 50	*338 99	*510 49
		*84 12	*262 55	*346 67
Shelby R. R.	Passenger	361 70	330 35	692 05
	Freight	*1,155 59	*172 33	1,327 92
		*793 89	158 02	635 87
	Total	*3,056 86	343 13	2,713 73
228 1887-'88—one year.				
Cincinnati div.	Passenger	380 06	435 28	815 34
	Freight	*3,262 68	130 48	*3,132 20
		*2,882 62	565 76	*2,316 86
Lexington branch	Passenger	98 98	91 30	190 28
	Freight	*104 55	*122 13	*226 68
		*5 57	*30 83	*36 40
Shelby R. R.	Passenger	*400 46	*200 02	*600 48
	Freight	*1,867 90	*413 67	*2,281 57
		*2,268 36	*613 69	*2,882 05
	Total	*5,156 55	*78 76	*5,235 31
1888-'89—one year.				
Cincinnati div.	Passenger	215 68	313 16	528 84
	Freight	*2,103 78	*337 28	*2,441 06
		*1,888 10	*24 12	*1,912 22
Lexington branch	Passenger	86 84	53 11	139 75
	Freight	*276 11	*90 80	*366 91
		*189 47	*37 69	*227 16
Shelby R. R.	Passenger	*631 41	*450 90	*1,082 31
	Freight	*6,457 59	*4,717 48	*11,175 07
		*7,089	*5,168 38	*12,257 38
	Total	*9,166 57	*5,230 19	*14,396 76

*Loss.

R. E. S. No. 7—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
1889-'90—one year.				
Cincinnati div.	Passenger	*111 92	*17 50	*129 42
	Freight	*2,261 40	*254 27	*2,515 67
		*2,373 32	*271 77	*2,645 09
Lexington branch	Passenger	50 65	32 21	82 86
	Freight	*56 46	*97 30	153 76
		*5 81	*65 09	70 90
Shelby R. R.	Passenger	55 10	168 39	223 49
	Freight	*2,878 02	*1,889 99	*4,768 01
		*2,822 92	*1,721 60	*4,544 52
	Total	*5,202 05	*2,058 46	*7,260 51

Recapitulation of net earnings from both passenger- & freight accruing to Cincinnati div. & Lexington branch of the L., C. & L. R'y and Shelby R. R. for seven (7) years & one (1) month.

Cincinnati	Passenger	2,089 12	2,583 34	4,672 46
	Freight	19,018 34	*215 14	*19,233 48
		16,929 22	2,368 20	*14,561 02
Lexington branch	Passenger	560 47	428 75	989 22
	Freight	*1,834 34	*767 78	*2,602 12
		*1,273 87	*339 03	*1,612 90
Shelby R. R.	Passenger	*1,189 49	801 01	*388 48
	Freight	*19,198 08	*9,270 67	*28,468 75
		*20,387 57	*8,469 66	*28,857 23
	Total	*38,590 66	*6,440 49	*45,031 15
Total net earnings accruing to Cin. div. of Lexington branch & Shelby R. R., June 1st, 1883, to June 30th, 1890	Passenger	1,460 10	3,813 10	5,273 20
	Freight	*40,050 76	*10,253 59	*50,304 35
	Total	*34,590 66	*6,440 49	*45,031 15

* Loss.

229 R. E. S. No. 8.

Statement of net earnings derived by the L., C. & L. R'y and Shelby R. R. on business coming from or going to Northern div. of C. & O. R. R. as arrived at by allowing the Northern div. of C. & O. R. R. an arbitrary of 60 miles haul on the freight and estimating the expenses the same as in statement marked R. E. S. No. 4—*i. e.*, by applying the average cost per ton per mile over the L., C. & L. R'y as the cost of moving and hauling this freight.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
June, 1883—one month.				
Cincinnati div.	Passenger	33 31	16 08	49 39
	Freight	293 09	81 34	374 43
		326 40	97 42	423 82
Lexington branch	Passenger	7 46	3 20	10 66
	Freight	5 26	3 81	9 07
		12 72	7 01	19 73
Shelby R. R.	Passenger	36 02	20 32	56 34
	Freight	*229 94	*31 54	*261 48
		*193 92	11 22	*205 14
	Total	145 20	93 21	238 41
1883-'84—one year.				
Cincinnati div.	Passenger	864 93	504 22	1,369 15
	Freight	1,764 96	1,095 90	2,860 86
		2,629 89	1,600 12	4,230 01
Lexington branch	Passenger	123 70	86 34	210 04
	Freight	282 30	92 31	374 61
		406	178 65	584 65
Shelby R. R.	Passenger	539 31	368 52	907 83
	Freight	*3,855 29	*1,477 52	*5,332 81
		*3,315 98	*1,109	*4,424 98
	Total	*280 09	669 77	389 68
1884-'85—one year.				
Cincinnati div.	Passenger	112 66	506 82	619 48
	Freight	2,087 66	1,266 89	3,354 55
		2,200 32	1,773 71	3,974 03
Lexington branch	Passenger	37 32	57 26	94 58
	Freight	277 41	111 53	388 94
		314 73	168 79	483 52

* Loss.

R. E. S. No. 8—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
Shelby R. R.	Passenger	*761 79	286 07	*475 72
	Freight	*2,488 36	*1,196 81	*3,685 17
		*3,250 15	*910 74	*4,160 89
	Total	*735 10	1,031 76	296 66
1885-'86—one year.				
Cincinnati div.	Passenger	56 64	360 26	416 90
	Freight	1,760 50	1,330 19	3,093 69
		1,820 14	1,690 45	3,510 59
Lexington branch	Passenger	68 34	28 89	97 23
	Freight	122 11	63 50	185 61
		190 45	92 39	282 84
Shelby R. R.	Passenger	*387 96	278 28	*109 68
	Freight	*3,001 36	*1,530 31	*4,531 67
		*3,389 32	*1,252 03	*4,641 35
	Total	*1,378 73	530 81	*847 92
1886-'87—one year.				
Cincinnati div.	Passenger	537 76	465 02	1,002 78
	Freight	2,871 06	1,449 43	4,320 49
		3,408 82	1,914 45	5,323 27
Lexington branch	Passenger	87 38	76 44	163 82
	Freight	72 64	126 70	199 34
		160 02	203 14	363 16
Shelby R. R.	Passenger	361 70	330 35	692 05
	Freight	*2,517 46	*948 77	*3,466 23
		*2,155 76	*618 42	*2,174 18
		1,413 08	1,499 17	2,412 25
1887-'88—one year.				
230 Cincinnati div.	Passenger	380 06	435 28	815 34
	Freight	2,189 95	1,497 42	3,687 37
		2,570 01	1,932 70	4,502 71
Lexington branch	Passenger	98 98	91 31	190 28
	Freight	80 81	72 22	153 03
		179 79	163 52	343 31

* Loss.

R. E. S. No. 8—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of C. & O. R. R.	Total both directions.
Shelby R. R.	Passenger	*400 46	*200 02	*600 48
	Freight	*2,659 18	*1,156 08	*3,815 26
		*3,059 64	*1,356 10	*4,415 74
	Total	*309 84	740 12	430 28
1888-'89—one year.				
Cincinnati div	Passenger	215 68	313 16	528 84
	Freight	2,092 24	1,353 77	3,446 01
		2,307 92	1,666 93	3,974 85
Lexington branch	Passenger	86 64	53 11	139 75
	Freight	242 85	82 61	325 46
		329 49	135 72	465 21
Shelby R. R.	Passenger	*631 41	*450 90	*1,082 31
	Freight	*7,412 31	*5,439 87	*12,852 18
		*8,043 72	*5,890 77	*13,934 49
	Total	*5,406 31	*4,088 12	*9,494 43
1889-'90—one year.				
Cincinnati div	Passenger	*111 92	17 50	129 42
	Freight	2,000 01	1,349 09	3,349 10
		1,888 09	1,331 59	3,219 68
Lexington branch	Passenger	50 65	32 21	82 86
	Freight	84 95	47 61	132 56
		135 60	79 82	215 42
Shelby R. R.	Passenger	55 10	168 39	223 49
	Freight	*3,859 27	*2,662 34	*6,521 61
		*3,804 17	*2,493 95	*6,298 12
	Total	*1,780 48	*1,082 54	*2,863 02

* Loss.

Recapitulation of net earnings from both passenger & freight accruing to Cincinnati div. & Lexington branch of the L., C. & L. R'y and Shelby R. R. for seven (7) year- & one (1) month, June 1st, 1883, to June 30th, 1890.

Cincinnati div.	Passenger	2,089 12	2,583 34	4,672 46
	Freight.....	15,062 47	9,424 03	24,486 50
		17,151 59	12,007 37	29,158 96
Lexington branch	Passenger ...	560 47	428 75	989 22
	Freight.....	1,168 33	600 29	1,768 62
		1,728 80	1,029 04	2,757 84
Shelby railroad	Passenger	*1,189 49	801 01	*388 48
	Freight.....	*26.023 17	*14,443 24	*40,466 41
		*27,212 66	*13,642 23	*40,854 89
	Total ...	*8,332 27	*605 82	*8,938 09
Total net earnings accruing to Cin. div., Lexington b'ch, — Shelby R. R., June 1st, 1883, to June 30th, 1890.	Passenger	1,460 10	3.813 10	5,273 20
	Freight.....	*9,792 37	*4,418 92	*14,211 29
		*8,332 27	*605 82	*8,938 09

231 R. E. S. 9.

Statement of net earnings derived by L., C. & L. R'y and Shelby R. R on business coming from or going to the Northern div., Cumb. & Ohio R. R., as arrived at by allowing the Northern div. of C. & O. R. R. an arbitrary of 60 miles haul on freight and estimating the expenses at 3c. per ton per mile.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
June, 1883—one month.				
Cincinnati div.	Passenger	33 31	16 08	49 39
	Freight.....	*626 72	5 38	*651 36
		*623 41	21 44	*601 97
Lexington branch	Passenger	7 46	3 20	10 66
	Freight.....	*9 37	*5 16	*14 53
		*1 91	*1 96	*3 87
Shelby R. R.	Passenger	36 02	20 32	56 34
	Freight.....	*229 94	*31 54	*261 48
		*193 92	*11 22	*205 14
	Total....	*819 24	8 26	*810 98

* Loss.

R. E. S. 9—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
1883–'84—one year.				
Cincinnati div.	Passenger	864 93	504 22	1,369 15
	Freight	*4,505 44	*493 93	*4,999 37
		*3,640 51	10 29	*3,630 22
Lexington branch	Passenger	123 70	86 34	210 04
	Freight	*364 36	*88 05	*452 41
		*240 66	*1 71	*242 37
Shelby R. R.	Passenger	539 31	368 52	907 83
	Freight	*3,855 29	*1,477 52	*5,332 81
		*3,315 98	*1,109	*4,424 98
	Total	*7,197 15	*1,100 42	*8,297 57
1884–'85—one year.				
Cincinnati div.	Passenger	112 66	506 82	619 48
	Freight	*3,151 01	*341 01	*3,492 02
		*3,038 35	165 81	*2,472 54
Lexington branch	Passenger	37 32	57 26	94 58
	Freight	*672 90	*84 65	*757 55
		*635 58	*27 39	*662 97
Shelby R. R.	Passenger	*761 79	286 07	*475 72
	Freight	*2,488 36	*1,196 81	*3,685 17
		*3,250 15	*910 74	*4,160 89
	Total	*6,924 08	*772 32	*7,696 40
1885–'86—one year.				
Cincinnati div.	Passenger	56 54	360 26	416 90
	Freight	*3,025 48	*407 50	*3,432 98
		*2,968 84	*47 24	*3,016 08
Lexington branch	Passenger	68 34	28 29	97 23
	Freight	*382 15	*6 55	*389 70
		*314 81	22 34	*292 47
Shelby R. R.	Passenger	*387 96	278 28	*109 68
	Freight	*3,001 36	*1,530 31	*4,531 67
		*3,389 32	*1,252 03	*4,641 35
	Total	*6,672 97	*1,276 93	*7,994 90

*Loss.

R. E. S. 9—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
1886-'87—one year.				
Cincinnati div.	Passenger	537 76	465 02	1,002 78
	Freight	*3,850 74	*556 96	*4,407 70
		*3,312 98	*91 94	*3,404 92
Lexington branch	Passenger	87 38	76 44	163 82
	Freight	*192 15	*381 02	*573 17
		*104 77	*304 58	*409 35
Shelby R. R.	Passenger	361 70	330 35	692 05
	Freight	*2,517 46	*948 77	*3,466 23
		*2,155 76	*618 42	*2,774 18
	Total	*5,573 51	*1,014 94	*6,588 45
232 1887-'88—one year.				
Cincinnati div.	Passenger	380 06	435 28	815 34
	Freight	*4,081 40	396 54	*4,477 94
		*3,701 34	38 74	*3,662 60
Lexington branch	Passenger	98 98	91 30	190 28
	Freight	*123 98	*142 84	*266 82
		*25	*51 54	*76 54
Shelby R. R.	Passenger	*400 46	*200 02	*600 48
	Freight	*2,659 18	*1,156 08	*3,815 26
		*3,059 64	*1,356 10	*4,415 74
	Total	*6,785 98	*1,368 90	*8,154 88
1888-'89—one year.				
Cincinnati div.	Passenger	215 68	313 16	528 84
	Freight	*2,919 11	*858 99	*3,778 10
		*2,703 43	*545 83	*3,249 26
Lexington branch	Passenger	86 64	53 11	139 75
	Freight	*337 56	*111 55	*449 11
		*250 92	*58 44	*309 36
Shelby R. R.	Passenger	*631 41	*450 90	*1,082 31
	Freight	*7,412 31	*5,439 87	*12,852 18
		*8,043 72	*15,890 77	*13,934 49
	Total	*10,998 07	*6,495 04	*17,493 11

* Loss.

R. E. S. 9—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
1889-'90—one year.				
Cincinnati div.	Passenger	*111 92	*17 50	*129 42
	Freight	*3,122 89	*806 84	*3,929 73
		*3,234 81	*824 34	*4,059 15
Lexington branch.	Passenger	50 65	32 21	82 86
	Freight	*79 03	*114 46	*193 49
		*28 38	*82 25	*110 63
Shelby R. R.	Passenger	55 10	168 39	223 49
	Freight	*3,859 27	*2,662 34	*6,521 61
		*3,804 17	*2,493 95	*6,298 12
	Total	*7,067 36	*3,400 54	*10,467 90

Recapitulation of net earnings from both passenger & freight accruing to Cincinnati div. & Lexington b'ch of the L., C. & L. R'y & Shelby R. R. for seven (7) years & one (1) month, June 1st, 1883, to June 30th, 1890.

Cincinnati div.	Passenger	2,089 12	2,583 34	4,672 46
	Freight	*25,312 79	*3,856 41	*29,169 20
		*23,223 67	*1,273 07	*24,496 74
Lexington branch.	Passenger	560 47	428 75	989 22
	Freight	*2,162 50	*934 28	*3,096 78
		*1,602 03	*505 53	*2,107 56
Shelby R. R.	Passenger	*1,189 49	801 01	*388 48
	Freight	*26,023 17	*14,443 24	*40,466 41
		*27,212 66	*13,642 23	*40,854 89
	Total	*52,038 36	*15,420 83	*67,459 19
Total net earnings accruing to Cin. div. & Lexington br'ch & Shelby R. R., June 1st, 1883, to June 30th, 1890.	Passenger	1,460 10	3,813 10	5,273 20
	Freight	*53,498 46	*19,233 93	*72,732 39
	Total	*52,038 36	*15,420 83	*67,459 19

*Loss.

L., C. & L. R'y Co.'s proportion of interest on bonded debt that would accrue to business coming from or going to the Northern div. of the Cumberland & Ohio R. R.—arrived at on basis of average cost of interest per passenger per mile and average cost of interest per ton of freight per mile.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of C. & O. R. R.	Total both directions.
June, 1883—one month.				
Cincinnati div.	Passenger	48 25	46 95	95 20
	Freight	270 18	21 61	291 79
		318 43	68 56	386 99
Lexington branch.	Passenger	9 81	7 25	17 06
	Freight	4 52	2 77	7 29
		14 33	10 02	24 35
	Total	332 76	78 58	411 34
1883-'84—one year.				
Cincinnati div.	Passenger	688 44	386 14	1,074 58
	Freight	1,421 86	360 51	1,782 37
		2,110 30	746 65	2,856 95
Lexington branch.	Passenger	78 86	56 60	135 46
	Freight	87 62	24 44	112 06
		166 48	81 04	247 52
	Total	2,276 78	827 69	3,104 47
1884-'85—one year.				
Cincinnati div.	Passenger	798 86	438 37	1,237 23
	Freight	1,003 54	308 01	1,311 55
		1,802 40	746 38	2,548 78
Lexington branch.	Passenger	27 60	42 02	69 62
	Freight	108 70	22 44	131 14
		136 30	64 46	200 76
	Total	1,938 70	810 84	2,749 54
1885-'86—one year.				
Cincinnati div.	Passenger	712 24	493 30	1,205 54
	Freight	772 13	280 17	1,052 30
		1,484 37	773 47	2,257 84
Lexington branch.	Passenger	37 31	76 40	113 71
	Freight	53 79	7 46	61 25
		91 10	83 86	174 96
	Total	1,575 47	857 33	2,432 80

R. E. S. No. 10—Continued.

		Coming from or over Nor. div. of C. & O. R. R.	Going to or over Nor. div. of the C. & O. R. R.	Total both directions.
1886-'87—one year.				
Cincinnati div	Passenger	452 19	366 41	818 60
	Freight	884 33	263 96	1,148 29
		1,336 52	630 37	1,966 89
Lexington branch	Passenger	43 47	57 62	101 09
	Freight	21 41	41 06	62 47
		64 88	98 68	163 56
	Total	1,401 40	729 05	2,130 45
1887-'88—one year.				
Cincinnati div	Passenger	434 09	418 63	852 72
	Freight	723 81	218 59	942 40
		1,157 90	637 22	1,795 12
Lexington branch	Passenger	47 79	46 39	94 18
	Freight	16 55	17 40	33 95
		64 34	63 79	128 13
	Total	1,222 24	701 01	1,923 25
1888-'89—one year.				
Cincinnati div	Passenger	425 83	385 22	811 05
	Freight	570 91	242 08	812 99
		996 74	627 30	1,624 04
Lexington branch	Passenger	40 87	34 34	75 21
	Freight	41	13 71	54 71
		81 87	48 05	129 92
	Total	1,078 61	675 35	1,753 96
234 1889-'90—one year.				
Cincinnati div	Passenger	468 25	422 82	891 07
	Freight	514 51	216 53	731 04
		982 76	639 35	1,622 11
Lexington branch	Passenger	30 52	.....	66 59
	Freight	14 44	.....	28 71
		44 96	.....	95 30
	Total	1,027 72	.....	1,717 41

Recapitulation.

Cincinnati div.....	Passenger....	4,028 15	2,957 84	6,985 99
	Freight.....	6,161 27	1,911 46	8,072 73
		10,189 42	4,869 30	15,058 72
Lexington b'ch..	Passenger ...	316 23	356 69	672 92
	Freight.....	348 03	143 55	491 58
		664 26	500 24	1,164 50
	Total....	10,853 68	5,369 54	16,223 22
Total Cincinnati div. & Lexington branch.....	Passenger....	4,344 38	3,314 53	7,658 91
	Freight.....	6,509 30	2,055 01	8,564 31
		10,853 68	5,369 54	16,223 22

235 Statement showing net earnings accruing to L., C. & L. R'w'y on business coming from or over the Northern division of the Cumberland and Ohio railroad and the loss in operating the Northern division of the Cumberland & Ohio railroad, exclusive of earnings accruing to L., C. & L. R'w'y from October 1st, 18—, — October 31st, 1887.

Year.	Month.	Earnings accruing to L.,C & L. R'w'y on business from Nor. div. of C. & O. R. R.				Loss in operating Nor. div. of C. & O. R. R.		
		Earnings.	Percentage of operating expenses to earnings.	Expenses.	Net earnings.	Earnings.	Operating expenses.	Loss.
1885...	October.....	575 62	78.14	449 79	125 83	1,924 24	2,658 83	734 59
	November..	731 65	93.39	683 29	48 36	2,015 36	2,366 07	350 71
	December..	594 72	86.54	514 67	80 05	1,914 08	2,477 21	536 13
	Total.....	1,901 99	.....	1,647 75	254 24	5,880 68	7,502 11	1,621 43
1886...	January.....	355 83	84.49	300 64	55 19	1,452 42	2,524 82	1,072 39
	February...	395 58	78 72	311 40	84 18	1,578 27	2,436 60	858 33
	March.....	286 44	73.32	209 92	76 52	1,529 19	2,345 40	816 21
	Total.....	1,037 85	.....	821 96	215 89	4,559 89	7,306 82	2,746 93
1886...	April.....	306 88	76.16	233 72	73 16	1,390 59	5,516 25	4,125 66
	May	527 63	73.70	388 86	138 77	1,748 33	3,083 86	1,335 53
	June.....	953 60	67.05	639 38	314 22	1,698 63	3,249 88	1,551 25
	Total.....	1,788 11	.....	1,261 96	526 15	4,837 55	11,849 99	7,012 44
1886...	July.....	1,852 74	63.69	1,148 16	654 58	2,708 03	3,380 20	672 17
	August	1,434 72	72.84	1,045 05	389 67	3,367 37	3,037 62	*329 95
	September.	1,176 98	74.84	880 85	296 13	3,015 25	3,660 94	645 69
	Total.....	4,414 44	.....	3,074 06	1,340 38	9,150 85	10,078 76	927 91
1886...	October.....	1,050 85	74.11	778 78	272 07	2,873 80	4,030 83	1,157 03
	Novemb r..	803 22	91.28	733 18	70 04	2,324 29	2,888 80	564 51
	December..	971 77	83.96	815 89	155 88	2,247 42	2,823 68	586 25
	Total.....	2,825 84	.....	2,327 85	497 99	7,445 51	9,743 31	2,307 80
1887...	January.....	695 49	82.92	576 70	118 79	1,782 84	3,007 57	1,224 73
	February...	527 74	74 89	395 22	132 52	1,175 39	3,179 04	2,003 65
	March.....	357 78	65.18	233 20	124 58	1,731 33	3,646 48	1,915 15
	Total.....	1,581 01	.....	1,205 12	375 89	4,689 56	9,833 09	5,143 53

* Gain.

Statement Showing Net Earnings Accruing, etc.—Continued.

Year.	Month.	Earnings accruing to L., C. & L. R'w'y on business from Nor. div. of C. & O. R. R.				Loss in operating Nor. div. of C. & O. R. R.		
		Earnings.	Percentage of operating expenses to earnings.	Expenses.	Net earnings.	Earnings.	Operating expenses.	Loss.
1887...	April	402 45	87.28	351 26	51 19	1,391 06	3,164 30	1,773 24
	May.....	661 47	73.08	483 40	178 07	2,174 54	4,005 82	1,831 28
	June.....	1,353 31	70.76	957 60	395 71	1,792 21	2,075 47	283 26
	Total.....	2,417 23	.....	1,792 26	624 97	5,357 81	9,245 57	3,887 78
1887...	July.....	1,658 04	69.64	1,154 66	503 38	2,166 69	3,587 75	1,421 06
	August.....	1,162 57	75.99	883 43	279 14	2,515 07	4,025 07	1,510 00
	September.	1,000 33	63.21	632 31	368 02	1,992 41	4,075 00	2,082 59
	Total.....	3,820 94	.....	2,670 40	1,150 54	6,674 17	11,687 82	5,013 65
1887...	October.....	656 48	79.93	524 72	131 76	1,975 39	3,976 28	2,000 89
Total Oct. 1st, 1885, to Oct. 31st, 1887..		20,443 89	.....	15,326 08	5,117 81	50,561 41	81,223 77	30,662 36
Dec. 1st, '82, to Sept. 30th, '85, as per statement filed in court.....		29,573 78	.....	24,615 11	4,958 67	73,446 83	103,987 57	30,540 74
Total Dec. 1st, '82, to Oct. 31st, '87 ...		50,017 67	.....	39,941 19	10,076 48	124,008 24	185,211 34	61,203 10

Result.

Net earnings accruing to L., C. & L. R'w'y Co. from Dec. 1st, '82, to Oct. 31st, '87, on business coming from or over the Northern div. of Cumb. & Ohio railroad 10,076.48

Loss in operating the Northern division of Cumb. & Ohio railroad from December 1st, 1882, to October 31st, 1887..... 61,203.10

Louisville, Ky., December 9th, 1887.

R. E. SEWELL,
Auditor of Disb'ts.

236 A 2.

Statement showing net earnings accruing to L., C. & L. R'w'y on business coming from or over the Northern division of the Cumberland & Ohio railroad and the loss in operating the Northern division of the Cumberland & Ohio railroad, exclusive of earnings accruing to L., C. & L. R'w'y from October 1st, 1885, to Oct. 31st, 1887.

Year.	Month.	Earnings.	Percentage of operating expenses to earnings.	Expenses.	Net earnings.	Earnings.	Operating expenses.	Loss.
1885...	October.....	575 62	78.14	449 79	125 83	1,924 24	2,658 83	734 59
	November..	731 65	93.39	683 29	48 36	2,015 36	2,366 07	350 71
	December..	594 72	86.54	514 67	80 05	1,941 08	2,477 21	536 13
	Total.....	1,090 99	.....	1,647 75	254 24	5,880 68	7,502 11	1,621 43
1886...	January.....	355 83	84 89	300 64	55 19	1,452 43	2,524 82	1,072 39
	February...	395 58	78.72	311 40	84 18	1,578 27	2,436 60	858 33
	March.....	286 44	73.32	209 92	76 52	1,529 19	2,345 40	816 21
	Total.....	1,037 85	.....	821 96	215 89	4,559 89	*7,306 82	2,746 93
1886...	April.....	306 88	76 16	233 72	73 16	1,390 59	5,516 25	4,125 66
	May.....	527 63	73.70	388 86	138 77	1,748 33	3,083 86	1,335 53
	June	953 60	67.05	639 38	314 22	1,698 63	3,249 88	1,551 25
	Total.....	1,788 11	.....	1,261 96	526 15	4,837 55	11,849 99	7,012 44
1886..	July	1,802 74	64.69	1,148 16	654 58	2,768 03	3,380 20	612 17
	August	1,434 72	72.84	1,045 05	389 67	3,260 94	3,037 62	*329 95
	September.	1,176 98	74.84	880 85	296 13	3,015 25	3,660 94	645 69
	Total.....	4,414 44	.....	3,074 06	1,340 38	9,150 85	10,078 76	927 91
1886...	October.....	1,050 85	74.11	778 78	272 07	2,873 80	4,030 83	1,157 03
	November..	803 22	91.28	733 18	70 04	2,324 29	2,888 80	564 51
	December..	971 77	83.96	815 89	155 88	2,237 42	2,823 68	586 26
	Total.....	2,825 84	.....	2,327 85	497 99	7,435 51	9,743 31	2,307 80
1887...	January.....	695 49	82.92	576 70	118 79	1,782 84	3,007 57	1,224 73
	February....	527 74	74.89	395 22	132 52	1,175 39	3,179 04	2,003 65
	March	357 78	65.18	233 20	124 58	1,731 33	3,646 48	1,915 15
	Total.....	1,581 01	.....	1,205 12	375 89	4,689 56	9,833 09	5,143 53
1887...	April	402 45	87.28	351 26	51 19	1,391 06	3,164 30	1,773 24
	May	661 47	73.08	483 40	178 07	2,174 54	4,005 82	1,831 28
	June.....	1,353 31	70.76	957 60	395 71	1,792 21	2,075 47	283 26
	Total.....	2,417 23	.....	1,792 26	624 97	5,357 81	9,245 59	3,887 78
1887...	July	1,658 04	69.64	1,154 66	503 38	2,166 69	3,587 75	1,421 06
	August	1,162 57	75.99	883 43	279 14	2,515 07	4,025 07	1,510 00
	September.	1,000 33	63 21	632 31	368 02	1,992 41	4,075 00	2,082 59
	Total.....	3,820 94	.....	2,670 40	1,150 54	6,674 17	11,687 82	5,013 65
1887...	October.....	656 48	79.93	524 72	131 76	1,975 39	3,976 28	2,000 89
Total Oct. 1st, '85, to Oct. 31st, '87...		20,443 89	.....	15,326 08	5,117 81	50,561 41	81,223 77	30,662 36
Dec. 1st, '82, to Sept. 30th, '85, as per statement filed in court.....		29,573 78	.....	24,615 11	4,958 67	73,446 83	103,987 57	30,540 74
Total Dec. 1st, '82, to Oct. 31st, '87...		50,017 67	.....	39,941 19	10,076 48	124,008 24	185,211 34	61,203 10

*Gain.

Result.

Net earnings accruing to L., C. & L. R'w'y Co. from Dec. 1st, '82, to Oct. 31st, '87, on railroad business coming from or over the Northern div. of Cumb. & Ohio....	$10,076 48
Loss in operating the Northern division of Cumb. & Ohio railroad from Decembe: 1st, 1882, to October 31st, 1887.....	61,203 10

Louisville, Ky., December 9th, 1887.

236½ COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, do hereby certify that the foregoing pages, 228 to 317 & ½, both inclusive, contain a full, true, and complete copy of the commissioner's reports referred to in vol. # 1 of the transcript of the record in the case wherein A. L. Schmidt, trustee, &c., is plaintiff and The Louisville, Cincinnati & Lexington Railway Company, &c., are defendants, # 1860, as the same appears on file in my said office, and that this is volume # 2 of said transcript and now made a part of the same.

Witness my hand this 12th day of August, 1892.

JOHN H. WELLER,
Clerk Louisville Chancery Court and ex Officio Clerk of the Louisville Law and Equity Court.

237 At a court held for the court aforesaid on the 30th day of May, 1892—

The court, being now advised, delivered a written opinion herein, which is ordered to be and is filed. In pursuance thereof it is now considered by the court:

1st. That the profits of the Louisville, Cincinnati & Lexington Railway Company on its own lines, on account of business coming to it from or over the Cumberland & Ohio Railway Company, Northern division, should be applied first to the payment of the operating expenses of the said Cumberland & Ohio Railway Company, Northern division, until they are fully paid, and then the balance, if any, should be applied to the payment of interest on the bonds issued on said road, and to provide for a sinking fund to retire said mortgage bonds referred to in the petition.

2nd. That the lease and mortgage sued on puts in pledge only the net earnings on business coming to the Louisville, Cincinnati & Lexington Railway Company from or over the line of the Cumberland & Ohio Railway Company, Northern division, and not the net earnings on business coming to the Cumberland & Ohio Railway Company, Northern division, coming from or over the lines of the Louisville, Cincinnati & Lexington Railway Company.

3rd. That the cost to the Louisville, Cincinnati & Lexington Railway Company of handling the freight coming to it from or

over the Cumberland & Ohio Railway Company, Northern division, is three cents per ton per mile.

238 4th. That the gross earnings of the Cumberland & Ohio Railway Company, Northern division, are $123,619.88 less than the reasonable and actual cost of operation of said road up to June 30th, 1890.

5th. That the cost to the Louisville, Cincinnati & Lexington Railway Company of doing the business coming to it from or over the Cumberland & Ohio Railway Company, Northern division, was up to said date $13,992.45 less than the gross receipts from said business, and therefore there have been no net earnings by the Louisville, Cincinnati & Lexington Railway Company from the business coming to it from or over the Cumberland & Ohio railway, Northern division, and the court adopts and approves state- marked R. E. S. No. 5 as the true statement of the account of the receipts and costs to the Louisville, Cincinnati & Lexington Railway Company of doing the business aforesaid.

6th. That the exceptions to the depositions of the railroad experts on the subject of the usual meaning of such phrases as those in dispute in the lease here in controversy are overruled. The exceptions to the rest of the depositions are sustained.

It is further considered that pl'ffs' motion to set aside the order previously entered setting aside an order directing the method of ascertaining the costs to the def't of doing the business coming to it from or over the C. & O., Northern division, be, and is, overruled.

It is therefore considered by the court that the petition be, and it is, dismissed.

239 It having been made to appear to the court that the plaintiffs Jacob Peter, Leander S. Reed, and Jane M. Reed have died pending this litigation, it is considered by the court that the defendant The Louisville, Cincinnati & Lexington Railway Company recover of the plaintiffs Adolph L. Schmidt, individually and as trustee for the owners of bonds of the Northern division of the Cumberland & Ohio Railway Company, James McCarty, George H. Breed, P. Booker Reed, Eliza S. Reed, W. C. Reamer, and Jacob Krieger, Sr., its costs herein and may have execution.

To all of which the plaintiffs and each of them except and from this judgment pray an appeal to the court of appeals, which is granted.

Defendant's Depositions.

The depositions of Charles Haydon, Edward Rowland, and Albert Fink, taken on the 17th day of June, 1891, at the office of Helm & Bruce, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the def't in an action between Schmidt, plaintiff, and L., C. & L. Rw. Co., defendant, now pending in the Lou. law and equity court, No. 1860, both parties, by attorney, being present.

CHARLES HAYDON, being duly sworn and examined by Mr. J. P. Helm, as attorney for the def't, deposed as follows:

1. Will you please state your name, age, residence, and occupation?

240 A. Charles Haydon; 53 years old; reside in this city; assistant comptroller of the L. & N. railroad.

2. I show you now an account kept between the Northern division of the Cumberland and Ohio road and the Louisville & Nashville railroad, running back, however, to a period when the account was kept between the old Louisville, Cincinnati and Lexington railroad and the Northern division of the Cumberland and Ohio, and ask you whether this report was taken from the records of the Louisville & Nashville Railroad office under your supervision, and whether you know it to be correct.

A. Yes, sir; this account was made out in my office and was taken from the books.

3. Is it a correct transcript?

A. Yes, sir; it is an accurate transcript of the book.

4. It shows correctly what it purports to show?

A. Yes; there is no question about that.

5. Will you please file that account with your deposition and mark it for identification?

A. I will.

The account was filed and made part of the deposition, marked Exhibit Haydon No. 1.

EDWARD ROWLAND, being duly sworn and examined by Mr. Helm, testified as follows:

1. What is your occupation?

241 A. Auditor of receipts of the Louisville & Nashville railroad.

2. Have you made any investigation into your records for the purpose of answering certain questions as to the receipts and other matters connected with this affair?

A. Yes, sir.

3. Can you tell me what is the average haul on ton-age on the Cumberland and Ohio division, south and north, going to or coming from the L., C. & L. and Shelby railroad?

A. Yes, sir.

4. Just make the statement, please.

A. The average haul per ton is 19.89 miles.

5. Will you please answer the same question as to the average haul of tonnage on the L., C. & L. and Shelby road on business going south and north o- coming from the C. & O., Northern division?

A. 48.8 miles.

6. What has been the gross revenue from the tonnage on the C. & O.?

A. On this same business?

7. Yes; on business coming from the L., C. & L. and Shelby road or going to it, both ways?

A. 3.37 cents per ton per mile.

8. Do you mean that that *that* is the average both ways?

A. Yes; on all business going to or coming from—that is, on the C., & O., Northern division, on the business as a whole.

9. How has the business—the revenue—been divided be-
242 tween the C. & O. and the L., C. & L. and Shelby railroad?

A. It has been divided, I might say, on a mileage basis—that is, on percentages made up from the mileages hauled over each division.

10. Were the statements showing the number of passengers carried over the L., C. & L. road and the Shelby railroad, and the number of passengers carried one mile over said roads, and the revenue accruing to said roads from said business, all of which are supposed to come over or go over the Northern division of the C. & O. road, compiled under your supervision from your office?

A. Yes, sir.

11. Are they, to the best of your knowledge and belief, correct?

A. Yes, sir.

12. What was the basis for dividing the revenue from passengers and crediting the earnings of the L., C. & L. and Shelby railroad?

A. A mileage basis.

13. Did each road get its local rate in dividing passenger earnings?

A. It did unless it was a reduced rate. In case of an excursion or special rates it was divided on a mileage basis.

In case of local business, all the local business is 3 cents a mile all through, so that practically it is a mileage basis, and one road gets the same as the other according to the mile.

243 14. Were the statements showing the number of tons of freight carried over the L., C. & L. railway and the Shelby railroad, and the number of tons of freight carried one mile over said roads, and the revenue on said freight accruing from said roads, all of which freight came from or went to the Northern division of the Cumberland and Ohio roads, compiled in your office and under your supervision?

A. Yes, sir.

15. Are they correct as far as you know?

A. To the best of my knowledge and belief, they are.

16. Did I understand you to say that the basis for dividing the

revenue and crediting the earnings to the various lines over which this freight was hauled was a mileage basis?

A. Yes, sir; practically a mileage basis, but I would like to say that there are, I think, some few exceptions. In cases where shipments go to a point south of Louisville or come from a point south of Louisville going to a point on the C. & O., Northern division, or from there, the division of earnings have not been made on a strictly mileage basis; in other words, they have been made on percentages furnished by the traffic department of the L. & N. railroad.

17. That is, on business coming from where?

A. Coming from or going to the C. & O., Northern division, from and to points south of Louisville. But that business is very small. It does not amount to anything. I never worked it up, but I do not think it cuts any figure.

244 18. The business you refer to is business coming from a way down south, and does not have anything to do with the L., C. & L., except passing over it, and it forms a very unimportant factor in the whole business?

A. Yes, sir.

19. What principle was the division made on of such business as you exempt from the mileage?

A. It was an arbitrary rate in which the C. & O. would get more than ordinary. In the one case I figured out, the C. & O. got more than otherwise. I go on that; I did not examine every one.

20. Has this business been divided between the L., C. & L. and the Shelby railroad and the Northern division of the C. & O. in the usual manner in which such division of earnings are made in other similar cases?

A. I don't think they have.

21. What is the difference?

A. Of course, I am not an expert at the division of earnings, and all that I have to do with it is to carry out the instructions I get from the proper officer of the company in regard to such things, but I do know that other short branches in the L. & N. system receive an arbitrary proportion.

22. Of the earnings?

A. Of the earnings in the division of the same. This is, I think, almost universally done.

23. Do you know of instances where the arbitrary are given except where the line is leased by the L. & N.?

245 A. Well, we have one instance which I recall, the case of the Kentucky Midland railway, from Georgetown, twenty-three miles.

24. State how that is divided.

A. We interchange freight with them and keep an account with them, and the agreement was that they should receive forty per cent. of the gross revenue on all shipments of freight from or to Louisville and any point on that road, and the L. & N. to receive sixty per cent.

25. What was the haul of the L. & N.?

A. Sixty-four miles, from Louisville to Frankfort.

26. Against what on their road?

A. Twenty-three miles, total, and there is considerable traffic from Frankfort to Georgetown, which does not go over the whole length of the Kentucky Midland road. In a case where it stops at Switzer's, they get forty and the L. & N. sixty.

27. Have you averaged the revenue, per ton per mile, received on the C. & O. railroad, and also on the L., C. & L. and Shelby road?

A. I gave the C. & O., but not the L., C. & L. and Shelby.

28. Please give each separate.

A. The average revenue per ton per mile received by the L., C. & L. railway and Shelby railroad, on freight tonnage coming from or going to the C. & O. railroad, Northern division, was 3.14 cents, and on the C. & O., for the same traffic, 3.37.

246 29. Your statements here would seem to indicate that on the whole business there was a larger rate allowed the Northern division of the Cumberland & Ohio than a mere mileage basis. If you can explain that, please do so.

A. The reason of that is the mileage over the L., C. & L. division in a great many cases, the shipments going east—that is, to Covington or Cincinnati—were much greater than the mileage on shipments going to Louisville, and the traffic going to Cincinnati, Covington, or east, which I think was mostly stock, was carried at a much lower rate than that going to Louisville. In some cases, I mean; I do not say in all cases, but I am just merely making this statement to explain why the gross revenue per ton per mile on the C. & O. could be more than *than* it could over the L., C. & L. railroad and Shelby road.

30. You figured it up on a mileage basis?

A. I worked that out to my own satisfaction to see how it could be. I did not exactly understand it myself at first, but I have an example here, which I think will explain that. Take a shipment from Bloomfield to Cincinnati, ten tons. That would be twenty-seven miles over the C. & O., Northern division, eighteen miles over the Shelby road, and 88 miles over the L., C. & L. railroad, which would make two hundred and seventy tons carried one mile over the C. & O., one hundred and eighty tons over the Shelby road, and eight hundred and eighty tons over the Cincinnati division. Now, apply two cents per ton per mile, and it

247 would produce a revenue for the C. & O. of $5.40; Shelby road, $3.60, and Cincinnati division, $17.60. Now, take another shipment going to Louisville, ten tons, twenty-seven miles over the C. & O.; ten tons over the Shelby road, eighteen miles, and ten tons between Anchorage and Louisville, twelve miles, and that would be 270 to the C. & O., 180 to the Shelby, and 120 over the L., C. & L. Now, apply a rate of four cents per ton per mile, and it will produce $10.80 for the C. & O.; $7.20 for the Shelby, and $4.80 for the Cincinnati division. Now, add tons carried one mile over the C. & O., would be twice 270, which would be 540 for the C. & O., and the total revenue would be $16.20, making an average rate per ton per mile of three cents. Shelby would be 360, carried

one mile, $10.80, which would produce three cents per ton per *jo*le, same as C. & O. Coming to the L., C. & L., you find 1,000, carried one mile, at a revenue of $22.40, which produces 2.24 cents per ton per mile.

31. According to this statement, do you not show that, although you have divided the earnings on a mileage basis between the different roads named, that, in averaging for the whole business, you do not get the same per ton per mile on all the different branches?

A. Yes, sir; and this demonstrates it.

32. So that the statement which you have submitted in regard to the rate per ton per mile does not disprove the fact that you have substantially divided the revenue on a mileage basis?

A. With those few exceptions which I mentioned, which
248 do not amount to anything at all in comparison with the bulk of the business. That is why I said it was practically a mileage basis. Of course, all this that I have been giving relates to freight business.

ALBERT FINK, for defendant, being duly sworn, and examined by Mr. Helm, deposed as follows:

1. State your name and age.

A. Albert Fink; age, sixty-three.

2. Are you engaged in any occupation now?

A. Not at present.

3. Have you ever been connected with railroads and railroad systems; if so, in what capacity? In other words, explain what experience you have had as a railroad man in the different departments.

A. I have been engaged in the construction and management of railroads for forty or forty-two years in various capacities from engineer of construction, engineer of maintenance of railroads, general manager to commissioner of railroad associations, located in New York and at Atlanta.

4. In other words, you have spent pretty much all of your business life at it?

A. Yes, sir; I believe I have.

5. Have you informed yourself or been informed as to how the earnings between the Northern division of the Cumberland and Ohio road and the Shelby railroad and the L., C. & L. Rw. have been distributed?

A. I have heard the testimony of Mr. Rowland on that
249 subject.

6. Do you think it has been properly done? Do you think the method of distribution has been proper?

A. It has not been the usual way of distributing earnings between a main line and a branch line that is a feeder to a main line.

7. What is the usual method?

A. The usual method is to allow the feeder an arbitrary rate or increased rate above what the main line gets.

8. Explain why this is done.

A. One of the reasons is on account of the length of the haul and the terminal expenses. The terminal expenses, *leading* and unloading, are the same whether the freight is hauled for a longer or shorter distance. It would not be just for a road five miles long to do all the loading and unloading and another road one hundred miles long to get the benefit of it and pay nothing for it.

9. You allow the short line an arbitrary rate to cover the cost *of* originating?

A. Yes, sir; the terminal expenses, that is one reason, and there is another reason: the branch road is at greater expenses in operating the road comparatively short, and having little business, when it brings business to the main line, doing a large amount of business, the main line can transact that business at less cost than the feeding road, and it would be perhaps proper to take the cost of each road as a basis for making the division so that it would
250 be just to each of the parties, and both parties would make about the same profit out of it, the main line having certain advantages over the branch road in doing the work cheaper, and the branch road laboring under a great many disadvantages, having to keep up a road-bed for a small traffic, while the main line keeps up a road-bed for a large traffic. That increases the expenses of the branch line, and therefore, as a matter of agreement between the two parties, they generally make an extra allowance to the branch road in dividing the rate between the main and the branch lines.

10. Have you considered the question as to what would have been and what would be a fair arbitrary for the L., C. & L. to allow the Northern division of the C. & O.?

A. Of course there is no fixed rule about such things. It is generally done by allowing the short line an increased mileage. Say they have fifty miles, you allow them one hundred or some such arbitrary way. It is a matter of bargain. Some roads make better bargains than others. It has been a rule with the trunk lines—I can hardly say rule, but a practice—to allow one hundred miles for anything less than fifty. As I say, it depends on individual cases and individual conditions, and not on any general rule.

11. Have you read the contract of lease between the Northern division of the C. & O. and the L., C. & L. road?

A. Yes, sir; they have been shown to me.

12. You have also read the mortgage of the L., C. & L. on the net earnings to the bondholders?

251 A. Yes, sir.

13. What would be, then, a fair arbitrary and a reasonable one to allow the Northern division of the Cumberland and Ohio under all the circumstances and contracts as you know them to exist?

A. I principally go by the length of haul in this case, and I find that the haul on the C. & O. *iws* about twenty miles in round figures, and the haul on the main line, L. & N. division, and Shelby road, is about forty-one. I would say that to allow the C. & O. at least as much mileage as the other, say forty miles, or a double haul, in order to make it simpler on what they actually did, I think

that would be as little as they could do, and they could be more liberal if they wanted to be, and it would not be anything out of the*n* way.

14. To allow them sixty?

A. I should at least insist on having the same haul as the main line if I were the manager of the C. & O., and I do not think I would be quite satisfied with it.

15. Have you been shown and had explained to you the principle upon which Mr. Sewell acte*d* in making his report No. 2, in arriving at the profits of the L., C. & L. on business coming to it and going from it to the Northern division of the C. & O.?

A. Yes. sir; Mr. Sewell explained to me the manner in which he made it out, which is simply taking the average cost on the L., C. & L. and Shelby road as a basis and considering that as the cost of the work coming from and going to the C. & O.

252 16. Is that a fair way to arrive at it?

A. I do not think it is fair exactly. I think this work, this short haul work which is done on the main line and Shelby road, is a *grate* deal more expensive than the average. Especially is that the case on the L., C. & L. road. Their operating expenses are very small on account of the large amount of cheap through business that the road transacts. They carry full cars from one end of the road to the other, and that sort of business can be done very cheap. On the other hand, to pick up freight—to carry it a short distance—is very much more expensive than the average cost on a road which transacts a large amount of through hauling. I do not think the work can be done for the average cost.

17. In other words, I understand from your answer that Mr. Sewell did not allow enough for the cost of doing the business.

A. I mean to say that the manner he adopted there would not be the manner I would adopt.

18. When you say it would not be fair, to which road do you mean it would not be fair?

A. I think the cost to the main line would be more than he would ar-ive at by the method he used. I do not know what he arrived at; I only speak of the method he used in computing it. I might say that it is a most difficult matter to estimate the cost of local work. I have worked at that problem very faithfully for many years. You have to take in consideration the condition of

253 the business of each road. You can only approximate it. There are so many thousand little elements in the matter that it is utterly impossible to arrive at any exact conclusion. Finally, it must remain a matter of judgment, based on your experience and upon prior investigation. I made a very thorough investigation of that two years ago in a case before the interstate commerce commission.

19. As a railroad man in the various capacities in which you have acted, have you had to consider a variety of contracts made between railroads and ascertain their meaning? Have you had any experience in that?

A. I have had some experience in that. I have made contracts for leases and consolidations, and all that sort of thing.

20. You have stated here that you have read the lease and mortgage referred to heretofore, which were executed, I believe, on the same date. I will ask you to state, viewing that from the standpoint of an experienced railroad man, whether, in your opinion, any part of the profits of that joint enterprise, if it may be so expressed, could be properly applied to the payment of interest.

(Question objected to.)

A. I do not understand that there is any provision that if there are no net earnings that the L., C. & L. obligates itself to pay any interest to the bondholders until there are some earnings.

21. Now, the particular point to which I wish you to address your judgment and to get your opinion is, suppose there
254 should be a deficiency in operating expenses on the Northern division of the C. & O., and that the L., C. & L. on business received from or taken to the Northern division of the Cumberland and Ohio should make a profit—that is, a deficiency on one side and a profit on the other—in your opinion what ought to become of it?

A. I think, according to the intention and spirit of the contract, the profit would be credited to the C. & O. until that profit exceeds the operating expenses and then it ought to be paid over.

22. For the interest?

A. For the interest; but I do not consider that the L., C. & L. makes any profit out of the lease until the operating expenses on the C. & O. are paid. It is no advantage to the L., C. & L. to have the lease until the operating expenses are paid.

23. At the request of Mr. Sewell, I will ask you to state what, in your judgment, would be a fair increase to allow to the cost of doing this work on the main line in order to make it entirely fair to both sides.

A. As I said before, I made a great many estimates of the cost of that sort of business, and the cost of local business on the several roads that I estimated amounts to about three to six cents per ton mile, although the main-line business may be done at three-quarters of a cent a ton mile. I made observations on the Pennsylvania road, which I have incorporated in a book. It deals particularly with the investigation of the cost of local business on the
255 Erie road and the Pennsylvania road, and I investigated the matter on the Louisville & Nashville many years ago and, as I said before, it averages from three to six cents per ton per mile under various conditions. Apply this to this case, I should think that about two cents per ton per mile would be a very small actual cost; not the whole cost of the work, but simply the additional cost it would be to the main line to do the business—that is, without losing money on it. I would consider two cents a very small estimate of the cost; as I said before, it would run from three to six.

24. We do not want the minimum, but what would be a fair estimate to allow?

A. Anything over two and a half cents per ton a mile; but still I want you to understand that this is not the total cost.

25. What, in your judgment, would be the total cost of doing the work?

A. I think it would run up to three or four cents, but, as I said before, this is merely a general judgment I give in this matter. I have not gone into particular conditions; this is merely from my knowledge of the general cost of local work.

26. That is to the main line. What would be your judgment as to the cost of the Shelby road?

A. The Shelby road is a road that had not so much through business. In that case the average cost would come near-r to the actual cost on the Shelby railroad.

27. What do you think that would be?

256 A. I believe I saw a statement about two and a half cents per ton per mile.

28. Three and a half, I believe it is.

A. Is it? I did not know what it was. If it was three and a half or three cents, two cents would be within reason. That is as low as the work could be done for.

29. And that would be below the actual cost?

A. Yes; take the two roads together—the Shelby and the Cincinnati division—I should think, considering the Cincinnati road doing a large business, I think two cents. I would be willing, if I were the C. & O. or the Louisville & Nashville, to settle for two cents.

30. For the main line and the Shelby road as a whole?

A. Yes; as an average.

LOUISVILLE, *June 22nd*, 1891.

The parties and counsel met pursuant to agreement and the cross-examination of Mr. FINK was proceeded with by Mr. Simrall.

31. Are you a stockholder of the Louisville, Cincinnati and Lexington Railway Co.?

A. I am not.

32. What connection had you formerly with the Louisville and Nashville railroad?

A. I was general manager and vice-president when I left the road.

Q. Are you a stockholder in the Louisville & Nashville railroad?

A. I was at one time, but I have not been for twelve years.

257 34. You have no stock now?

A. No, sir.

35. And have not for twelve years?

A. No, sir, or longer.

Q. You have stated that in making traffic arrangements between a trunk line or long road, like the L., C. & L., and a feeder, line the C. & O., it has been usual, by agreement, to give the short road or feeding road an arbitrary rate on account of the extra terminal expenses and increased expenses as mentioned by you?

A. Yes, sir.

37. Suppose it had been agreed between the trunk line, such as the L., C. & L., and a short road, like the C. & O., that they should not charge or receive more or greater rate for freight or passengers than the trunk line or the L., C. & L. received on its own line for like local business, would you still say, in the face of that, that the short road or the C. & O. should have an arbitrary rate?

A. Oh, no. If there had been an agreement to the contrary, as a matter of course there would not. If there had been an agreement on the exact basis the agreement would stand.

Re-examined by Mr. HELM:

38. Since Judge Simrall examined you has he shown you the section of this lease upon which he based his question just put to you?

A. He showed me section 8.

258 39. As the section upon which he based his question?

A. Yes, sir.

40. As a railroad man of experience will you please say what that section 8, in your opinion, means?

Question objected to.

A. I think the eighth section has reference to tariff rates; that they should not charge more on the branch line than they do on the main line—that is, to the public. For example, for fifteen or twenty miles of haul they should not charge more to the public on the branch line than they do on the main line in making out their tariff. I do not think that has any reference to the division after the tariff is once established. It is as to the charge to the public.

This article was put in for the protection of the public and of the people who live on the branch road. The division of the freight is entirely independent of the tariff. How the railroads may distribute the tariff rates among themselves, that is a question all over the country between themselves.

Nobody has anything to do with that. The people are not affected by it. I do not know whether they had that in their minds, but reading the article as an entirely disinterested party and understanding what the railroads have done on this question, that is my explanation.

41. When it is said that one railroad company allows another company arbitraries that don't mean that it allows the other road to charge a greater rate?

259 A. No, sir; the rate is entirely different question. They fix a rate from New York to Peoria, for instance, that is a published rate, but the short line of railroad that delivers the freight at Peoria gets proportionately more per ton per mile than the long lines from New York to Columbus, Ohio.

I mention that as a matter of fact which came under my observation, but it did not affect the tariff at all.

The tariff is one thing and the division of the freight is another thing.

STATE OF KENTUCKY, }
County of Jefferson. }

Louisville Law and Equity Court.

I, Clarence E. Walker, official reporter for said court, certify that the foregoing deposition- of Chas. Haydon, Ed. Rowland, & Albert Fink — taken pursuant to notice and agreement before me at the time and place and in the action mentioned in the caption; that the said witness- were first duly sworn by me that the testimony they should give in the action should be the truth, the whole truth, and nothing but the truth; that said depositions were first taken by me in shorthand and a full and accurate transcript of same made by me; that the signature of the witness- to said depositions respectively and the reading of the same to them were waived by counsel; that plaintiff appeared by Mr. Simrall and defendant — Mr. Helm.

Witness my hand this 22 day of June, 1891.

CLARENCE E. WALKER,
Official Reporter.

260 The deposition of Milton H. Smith, taken at the law office of Helm & Bruce, situate in Kenyon building, Fifth street, Louisville, Ky., to be read in evidence on behalf of defendants in a certain action now pending in the Louisville law and equity court, wherein Adolph L. Schmidt and others are plaintiffs and Louisville, Cincinnati and Lexington Railway Co. and others are defendants.

Said witness, H. M. SMITH, being by me first duly sworn, deposed as follows:

Direct examination by Mr. J. P. HELM, attorney for defendants:

Q. Are you the president of the Louisville & Nashville Railroad Co.?

A. I am.

Q. How long have you been engaged in the railroad business?

A. Thirty-one or two years.

Q. State, please, in what capacities you have been engaged.

A. As telegraph operator, assistant agent, superintendent's clerk, train dispatcher on the Mississippi Central railroad for about three years, general agent and superintendent of transportation of the Unites States military railroads for about two years, division superintendent and roadmaster of the Alabama and Tennessee Rover railroad for a short time, local agent of the Louisville & Nashville railroad at Louisville for about four years, and general freight
261 agent of the same company for about nine years, and general freight agent of the Baltimore & Ohio Railroad Company for three years, and since the 1st of January, 1882, have been traffic manager and vice-president and president of the Louisville & Nashville Railroad Company.

Q. Have you examined the lease and contract and mortgage involved in this litagation, being executed between the Louisville, Cincinnati and Lexington Railway Company, upon the one side, and the Northern division of the Cumberland and Ohio, upon the other?

A. I have.

Q. I will ask you whether, as a railroad man, you have been often brought into contact with and had to observe and construe the language employed in such instruments—railroad contracts and leases.

Question objected to by counsel for plaintiffs.

A. I have.

Q. I now hand you a copy of the lease involved in this controversy, wherein the Northern division of the Cumberland and Ohio is the lesser and the Louisville, Cincinnati and Lexington Railway Company is the lessee, and ask you to observe that provision which provides for the Louisville, Cincinnati and Lexington Railway Company using a certain portion of its net profits to make good a deficiency, if there should be any, in the payment of interest from the receipts of the Northern division of the Cumberland & Ohio.

You will observe that the lease provides that if the net
262 earnings on the leased line do not prove sufficient to pay the interest and provide for a sinking fund on the mortgage bonds, then the Louisville, Cincinnati & Lexington Railway Company, if all other sources of raising money on the Cumberland and Ohio (Northern division) prove insufficient, will supply the deficiency, so far as it may be done, by appropriating the net earnings, or so much thereof as may be needed, on its own lines which may accrue by reason of business coming to it from or over the line of the Northern division of the Cumberland & Ohio. It is now contended that this provision of the lease was intended to cover net earnings on business going to the leased line as well as business coming from it. You will please state, from the standpoint of a railroad man of experience, whether there are any reasons or considerations which induce a trunk line or principal line of railroad, in leasing a short or feeding line, to pledge the profit made by the main line on business coming to it from or over the leased line which do not exist as to business going to the leased line from the principal line. You will also please state what form of expression is usually employed in such contracts when the purpose is to pledge or affect the business both ways.

Question objected to by counsel for plaintiffs.

A. There are many reasons why a line receiving traffic from a connecting or branch road would be willing to make some concession or allow a consideration for it that would not apply upon traffic delivered by the same road to the same connecting or
263 branch road. It is almost universal that the line receiving traffic from a connecting or branch road is the one that

makes the concession, if any is made. Such concessions may be made and are made in various ways.

They may be made by allowing the branch road or connecting road originating and delivering traffic to the main line an arbitrary proportion of the revenue, or a proportion of the revenue in excess of what it would receive on a *pro rata* or mileage basis. Sometimes concessions are made by the line receiving the traffic assuming the cost of transfer. Sometimes it is done under a specific contract to allow the branch or connecting road a proportion of the gross or net earnings derived from the transportation of the traffic so received from the branch road. It is a matter of agreement or contract. Such agreements or contracts invariably stipulate whether the terms are applicable to traffic coming from or going to such branch road, or if in both directions it is so distinctly stipulated either by the term "going to and coming from" or usually the term "passing between points on the connecting road and main line." In 1870 (I think) the Louisville & Nashville Railroad Company entered into a contract with the Glasgow Railroad Company agreeing to give to that company 10% of the net earnings derived by the Louisville & Nashville railroad upon traffic coming from and going to points on the said Glasgow railroad. I have negotiated a number of leases and many hundred traffic agreements and contracts, and in every case where it relates to traffic passing connecting roads such agreements clearly stipulate whether
264 it is traffic coming from or going to or passing between. *If the term passing between.* If the term passing between points on the two or more roads parties to the agreement is used, it means traffic in both directions. If it says coming from, it applies to traffic coming from the road originating the traffic and delivered to the connecting road. If it says "going to," then it applies to traffic delivered by the road originating to the connecting road.

Q. Have you examined Special Commissioner R. E. Sewell's report, especially that phase of it known as #2? If so, please state whether, in your opinion, it proceeds upon a correct principle, and whether or not it is correct in details. Answer this question fully.

A. I have examined said report and find it erroneous in several particulars. It is described as a statement of "net earnings derived by the L., C. &. L. railway from passengers and freight coming from or over the C. & O., Northern division, arrived at on basis of cost per passenger mile and cost per ton of freight per mile, being passenger and freight proportion of all expenses included." It is erroneous inasmuch as the heading does not give a correct description of the statement. It states that it is net earnings derived by the L., C. & L. railway from passengers and freight coming from or over the C. & O., Northern division, when in fact it is a statement proposing to show the net earnings derived by the L., C. & L. railway on passengers and freight passing *between* points on the
265 C. & O., Northern division, and points on the L., C. & L. railway, or net earnings derived from the transportation of traffic in both directions; second, it is erroneous inasmuch as in deducting the net earnings they were arrived at on basis of average cost per pas-

senger mile and cost per ton of freight per mile on each division of the L., C. & L. railway. This is incorrect, especially in so far as it applies to freight traffic passing over the Cin'nati division. It is impossible to transport the traffic coming from or going to the C. & O., Northern division, over the L., C. & L. railway at the average cost of all traffic passing over the Cincinnati division. The average haul over the Cin'nati division of traffic coming from and going to the C. &. O., Northern division, is very much less than the average haul of the total traffic moved over the Cincinnati division. It is impossible to transport the miscellaneous traffic coming from and going to the C. & O., Northern division, for the short average distance hauled at the same average cost of moving the relatively immense total traffic over the Cincinnati division the average distance hauled, which is several times greater, and a large proportion of which consists in car-load or bulky traffic passing over the entire length of said Cincinnati division in through cars—that is, without incurring the expense of loading and unloading at either terminus, while *of* the traffic coming from and going to the C. & O., Northern division (the average haul of which on the Cincinnati division is much
266 less than the average haul of all), has to be loaded or unloaded at, at least, one of the termini. It is not possible to handle the small amount of traffic coming from or going to points on the C. & O., Northern division, at the stations at the same average cost for station expenses of the entire division; in other words, the cost of receiving and loading and of unloading and delivering the relatively small amount of traffic going to the Cincinnati division from the C. & O., Northern division, or coming from the Cincinnati division to the C. & O., Northern division, is much greater than the average cost per ton of receiving and loading and unloading and delivering all the freight traffic at all stations on the Cincinnati division, including the immense traffic moved over the Cincinnati division in through cars, on which practically no station expense is incurred. I estimate that the cost to the Cincinnati division of handling the small amount of miscellaneous traffic passing between points on the C. & O., Northern division, and the Louisville station to be at least two cents per hundred or forty cents per ton, which expense is to be borne and chargeable to the small amount of revenue derived from transporting traffic between Louisville and Anchorage, a distance of twelve miles.

Q. Please state whether the earnings as between the main line and the leased line have been distributed according to the usual method of distributing earnings between leasing and leased lines; if not, please state wherein the present case differs from the ordinary rule.

267 A. The earnings derived from the transportation of freight traffic passing between points on the C. & O., Northern division, to points on the Shelby railroad and the L., C. & L. railway have been divided upon the mileage basis—that is, each of the roads receiving such proportion of the joint revenue as the distance haul over each division bears to the total distance haul. This is not the usual method of dividing revenue between branch roads and main

lines. The revenue derived from transportation of property passing between points on the C. & O., Southern division, and points on the L. & N. railroad is divided between the two companies by allowing the C. & O., Southern division, a proportion of the joint rate, approximating its local rates. The rate on grain between stations on the C. & O., Southern division, from Campbellsville to Greensburgh and Louisville, is 15 cents per 100 pounds, of which the C. & O., Southern division, receives seven cents per hundred for haul of from nineteen to thirty-one miles and the L. & N. Railroad Co. receives eight cents per hundred for haul of sixty-seven miles. The rate upon coal passing between mines in the Jellico district and stations on the C. & O., Southern division, Campbellsville to Greensburgh, is $1.75 per ton, of which the C. & O., Southern division, receives eighty-seven and one-half cents and the L. & N. R. R. Co. eighty-seven and one-half cents, which practically gives the C. & O., Southern division, constructive mileage of 133 miles for an actual haul of not over 31 miles. The revenue derived from trans-
268 portation of property passing between points on the Glasgow railroad and points on the L. & N. railroad is divided by giving the Glasgow Railroad Company approximately its local tariff. The rate on class D, which includes grain passing between points on the Glasgow railroad and Louisville, is 17 cents per hundred, of which the Glasgow railroad receives five cents for a haul of not over ten miles and the L. & N. railroad receives twelve cents for a haul of ninety miles. The rate on coal from Earlington, Ky., to Glasgow is $1.85 per ton, of which the L. & N. railroad receives $1.25 for a haul of 148 miles and the Glasgow railroad 60 cents for a haul of ten miles. The revenue derived from transportation of traffic passing between points on the Springfield branch and points on the L. & N. railroad is divided by allowing the Springfield branch a proportion largely in excess of what it would receive were the revenue divided upon the mileage basis. Upon traffic passing between Springfield and Louisville the branch receives 40% of the rate for a haul of twenty miles and the L. & N. receives 60% for a haul of 40 miles. Upon property passing between points on the Cumberland Valley branch, Corbin to Middlesborough and Louisville included, the branch is allowed 40% for a haul of from 50 to 40 miles, and the main line 60% for a haul of 70 miles. A somewhat similar basis is used in dividing revenue derived from the transportation of property passing between points on the L. & N. railroad and the Owensboro and Nashville railroad, the Clarksville & Princeton branch, Nashville, Flor-
ence & Sheffield railroad, Pensacola & Atlantic railroad,
269 and other branch railroads owned and controlled by the L. & N. Railroad Company. The revenue derived from the transportation of property passing between points on the Chesapeake & Nashville, which is not owned or controlled by the Louisville & Nashville Railroad Company, but connects with the Louisville & Nashville railroad at Gallatin and Louisville, is divided by giving the Chesapeake & Nashville twenty-five per cent. for a haul of five to thirty-five miles, while the L. & N. receives seventy-five

per cent. for a haul of one hundred and fifty miles. The revenue derived from the transportation of property passing between Georgetown and Louisville (the former on the Kentucky Midland railroad) is divided by giving the Kentucky Midland 37½% for a haul of twenty-three miles, and the L. & N. railroad 62½ for a haul of 65 miles. It may be asked why, if this is the universal custom for the Louisville & Nashville railroad to allow branch roads owned or controlled by it and branch roads connecting with it, but not owned or controlled by it, a proportion of the revenue derived from the transportation of property passing between points on the two lines in excess of what such branch or connecting roads would receive upon a mileage basis, why the same basis or a similar basis for dividing revenue is not applied to revenue derived from the transportation of property passing between points on the C. & O., Northern division, to points on the L., C. & *B.* Railway division. The only explanation I can give is that a portion of the C. & O.,
270 Northern division, was in operation before the Louisville and Nashville Railroad Company acquired the L., C. & L. railway, and our auditors seemed to have continued to use the basis for dividing such joint revenue that was in effect before the Louisville & Nashville Railroad Company acquired the property. The matter does not seem to have been ever considered.

Q. If the principles which you have spoken of as being almost universal in their application should be applied in this case, about what arbitraries should be allowed to the Northern division of the Cumberland & Ohio to put it upon the same footing with other leased or connecting lines?

A. I think the C. & O., Northern division, should be allowed a proportion of the joint revenue upon joint freight traffic equal to or approximating its local tariff rates, or should be allowed a constructive mileage of not less than sixty miles.

Q. Does the Louisville & Nashville Railway Company own any of the bonds executed by the C. & O., Northern division?

A. The Louisville & Nashville railroad, as the owner of the stock of the L., C. & L. Railway Company, and thereby responsible for the payment of the bond obligations of that company, is the owner of fifty bonds of the C. & O., Northern division, said bonds having been placed in the sinking fund under the mortgages.

Q. Take the whole business resulting to the L. C. & L. and lessee of the line in this case by reason of the construction and oper-
271 ation of the C. & O., Northern division; state whether it has resulted in a loss or a profit to the L., C. & L. Railway Company.

A. The contracts between the L., C. & L. railway and the C. & O., Northern division, have resulted in very great losses to the Louisville & Nashville Railroad Company. The gross earnings of the C. & O., Northern division, have never been sufficient to pay operating expenses. On the contrary, the deficit has been very large. The total loss growing out of the contracts between the L., C. & L. railway and the C. & O., Northern division, up to June 30, 1890, amounted to five hundred and twenty-two thousand one hundred

and sixty-three dollars and thirty-eight cents ($522,163.38), not including loss upon depreciation in the value of the fifty bonds owned, resulting from the failure of the property to earn an amount in excess of the operating expenses sufficient to pay the interest upon the said bonds. The operating expenses to June 30, 1890, were three hundred and nine thousand and twenty-seven dollars and thirty-seven cents ($309,027.27), and the gross earnings one hundred and eighty-five thousand four hundred and seven dollars and forty-nine cents ($185,407.49); operating expenses in excess of gross earnings, one hundred and twenty-three thousand six hundred and nineteen dollars and eighty-eight cents ($123,619.88).

Q. You have stated several reasons why view # 2 of the report of R. E. Sewell was erroneous. If any other reason occurs to you, you will please state it.

A. That view is erroneous, inasmuch as it shows what
272 are termed net earnings upon traffic passing between points on the C. & O., Northern division, and points on the Shelby road and the L., C. & L. railway from December 1st, 1882, to June 30, 1890, amounting to sixty thousand one hundred and ninety-two dollars and twenty-seven cents ($60,192 27).

No net earnings could possibly accrue to the L., C. & L. railway upon traffic coming from or going to points on the C. & O., Northern division, so long as the operating expenses of the C. & O., Northern division, were largely in excess of the gross earnings, and as the deficit from operation of the C. & O., Northern division, which has been paid by the L., C. & L. Railway Company, was very largely in excess of the so-called net earnings as shown on view # 2, it must necessarily be erroneous, as a correct statement of net earnings derived by the L. & N. railroad upon traffic coming from or going to points on the C. & O., Northern division, must necessarily take into consideration the losses to the L., C. & L., L. & N. railroad, resulting from operation of the C. & O., Northern division.

Q. What is the character of freight generally received by the L., C. & L. from the C. & O., Northern division?

A. A large proportion of the tonnage coming to the L., C. & L. railway from points on the C. & O., Northern division, consists of grain and live stock, is received in car-load quantities, and is usually destined to eastern points, thus giving the L., C. & L. railway a long haul upon that class of traffic to Cincinnati or Lexing-
273 ton, while of the miscellaneous traffic coming from the L., C. & L. railway to points on the C. & O., Northern division, it is nearly all shipped from Louisville, giving the L., C. & L. railway a haul of twelve miles to Anchorage. That is one very strong reason why where parties representing the L., C. & L. railway and negotiating a lease or contract might be willing to give to the C. & O., Northern division, a proportion of the revenue it derived upon traffic coming from stations on the C. & O., Northern division, and not give the C. & O., Northern division, any portion of the revenue derived from traffic going to stations on the C. & O., Northern division.

M. H. SMITH.

STATE OF KENTUCKY, }
County of Jefferson, } *sct:*

I, John P. Cassilly, a notary public in and for the county and State aforesaid, certify that the foregoing deposition of M. H. Smith was taken before me at the time and place and for the purpose in caption mentioned; that said witness was duly sworn before giving his said deposition; that the same was taken by me in shorthand in his presence, and the foregoing is a true and accurate transcript of my notes; that the reading of the deposition to the witness was waived by consent of parties, and the same was subscribed by the witness in my presence; that both parties were present at the taking of the same by counsel.

Witness my hand this 2nd day of October, 1891.

JOHN P. CASSILLY,
Not. Pub., Jeff. Co., Ky.

274 The deposition of W. H. McDoel, taken on the 16th day of October, 1891, at the office of Helm and Bruce, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the def't in an action between Schmitt and others, plaintiff-, and L., C. & L. R. R. Co., defendant, now pending in the L ouisville law — equity court, both parties, by attorney, being present.

W. H. MCDOEL, being duly sworn and examined by Mr. James P. Helm, as attorney for the def't, deposed as follows:

Plaintiff objects to each and every of the questions propounded to this witness and his answers thereto.

2 Q. What is your occupation?

A. General manager of the Louisville, New Albany and Chicago railroad.

Q. 2. How long have you been in the railroad business and in what capacity have you served?

A. Thirty years. I have been clerk in the freight department, agent, general freight agent, traffic manager, and general manager.

Q. 3. How long were you traffic manager?

A. Four or five years.

Q. 4. Is it customary for railroads, dealing together, in case, for instance, of a short line or branch line feeding a main line, to divide the receipts upon a mileage basis?

A. No, sir.

Q. 5. What is customary in such cases?

275 A. The custom that usually prevails is to allow the branch line an arbitrary—either a percentage or an arbitrary division of the through rate.

Q. 6. Have you consulted the railroad situation from the map sufficiently to be able to tell how the Northern division of the Cumberland and Ohio connects with the L. & N. system, formerly the Louisville, Cincinnati and Lexington railroad?

A. You refer to the branch—the line at Anchorage?

Q. 7. The Shelby road runs from Anchorage to Shelbyville and then the Northern division of the Cumberland and Ohio be*ings* at Shelbyville and runs to Bloomfield?

A. I know the location.

Q. 8. In case the L., C. & L. leased the Northern division of the Cumberland and Ohio, what would be a fair arrangement for a division of receipts between those two roads from points on that line?

A. Destined where?

Q. 9. Destined to point- on the L., C. & L. and beyond.

A. If you will give me the distance I can answer more intelligently.

Q. 10. I have no particular shipment in mind. Knowing the L., C. & L. and the amount of business it does, and knowing this branch line, make an estimate.

A. On business here or to Cincinnati?

—. 11. Both places—take it all around.

A. The Shelby road should be allowed practically their local rates.

Q. 12. This is the Northern division of the Cumberland & Ohio?

276 A. That is the same line.

Q. 13. Nom, sir, that is not the same line. I will show you a map showing the situation.

A. I was speaking of the line west of Shelbyville.

The map was here exhibited to the witness.

Q. 14. How would the rates be with reference to the Northern division of the Cumberland and Ohio?

A. They should be allowed their local rates, a proportion of the through rate equal to their local rate.

Q. 15. Do you know, in your experience, of any instance of which you can tell us where business has been divided upon this arbitrary basis? If you do, give us some illustration.

Question objected to by the plaintiff.

A. Yes, sir; we have it on our own line. We divide with eastern lines at junctions north of New Albany. We are allowed an arbitrary percentage above the mileage per cent. For instance, business that leaves our line at Michigan City, originating anywhere south of there, five, ten, fifteen, or one hundred miles or more, we are allowed on the through rate of lower classes of freight, grain, lumber, or stone, an arbitrary of two cents per hundred and a *pro rata* percentage of the balance of the rate on the business of our New Albany mileage—our mileage from New Albany to Michigan City.

Q. 16. Even though your haul is only five miles?

A. Any haul. If the haul is five miles we are allowed two hundred and eighty-eight miles and an arbitrary of two cents per hundred. That same arrangement obtains at nearly all the crossings where we do business.

277 Q. 17. State whether that is true generally of feeding or originating lines, both long or short.

A. Not always on long lines, but usually on short lines; for instance, what is known as the I. I. I. road, which runs from Streator through Kankakee to a connection with the Grand Trunk line, probably one hundred miles in length, they receive of the New York rate about twenty per cent, whereas on a mileage rate they would only be entitled to ten per cent.

Q. 18. State whether railroads can handle local business at the same cost per ton per mile that they can handle through business and if they cannot, in your mind, tell us why that is.

A. It costs more to handle local business than through business, for the reason that it has to be gathered up at a number of stations. Trains have to be stopped and switched and laided and unloaded, and the cost of handling the business is more—the fuel.

Q. 19. About how much greater is the handling of this local business than the handling of through business? Have you considered about what proportion they bear to each other?

A. That is a hard question to answer correctly and definitely, perhaps. It varies on different railroads. I should say, as a rule, that it would cost two and a half to three times more to handle local business.

Q. 20. Would you think it a proper method of arriving at the cost of doing this local business between the L., C. & L. and the Northern division of the Cumberland and Ohio to adopt as a basis the cost of doing the whole business on the L., C. & L.?

278 A. I should think not.

Q. 21. For the reasons you have just stated?

A. Yes, sir.

Q. 22. Have you in your various capacities in railroading come often in contact with traffic contracts?

A. Yes, sir; I have made a good many and am conversant with a good many others.

Q. 23. When the purpose is to bind or pledge the business between two roads going both ways, what is the language generally employed by railroad men?

Question objected to by the plaintiff.

A. The contract would read: "To and from" or "between."

Q. 24. Did you ever know of an instance where the purpose was to pledge the business both ways where the language used was coming to one road from and over the other road?

A. No, sir; never.

Q. 25. What is generally understood by expert railroad men by the language "coming from and over"?

A. I should say that meant coming from stations the line named and from points beyond received from other companies.

Q. 26. What would be a fair average cost per ton per mile for doing local business between the two roads as you now understand the situation from the railroad map exhibited to you?

A. That depends largely on the volume of business they do. I can hardly give an estimate.

Q. 27. Of course a very large business can be done cheaper
279 per ton per mile than a very light business?

A. Very much so.

Q. 28. You do not know enough about the traffic on these two roads to form an intelligent idea on that subject?

A. I would not like to express an opinion on that, because I do not know about *tha mount* of traffic.

Cross-examined by Mr. SIMRALL:

Q. Is it not a fact that there is no rule at all on the subject of arbitrary, except what is agreed on between the branch line and the main line, and is it not a matter of contract that the circumstances of different roads vary so much that it is impossible to have a fixed rule so far as prorating the cost of transportation is concerned?

A. There is no fixed rule, but there is a custom.

Q. Is not that custom varied by circumstances owing to the situation of the road and the circumstances connected with the traffic?

A. It is varied, of course, in regard to the amount only.

Q. I say the amount to be allowed by one road to another?

A. Yes, sir.

Q. That is always varied by circumstances?

A. Yes, sir.

Re-examined by Mr. HELM:

Q. When you say it is varied with reference to the amount, do you mean that the universal custom is to allow an arbitrary,
280 but the amount of the arbitrary varies with the different roads?

A. Yes, sir.

Q. That is what you mean?

A. Yes, sir.

STATE OF KENTUCKY, }
County of Jefferson. }

Lou. Law & Equity Court.

I, Clarence E. Walker, official reporter for said court, certify that the foregoing deposition of W. H. McDoel — taken, pursuant to agreement, before me, at the time and place and in the action mentioned in the caption; that the said witness was first duly sworn by me, that the testimony he should give in the action should be the truth, the whole truth, and nothing but the truth; that said deposition was first taken by me in shorthand, and a full and accurate transcript of same made by me; that the signature of the witness to said depositions and the reading of the same to him were waived by counsel

that plaintiff appeared — Simrall & Bodley and defendant — Helm & Bruce.

Witness my hand this 16th day of October, 1891.

CLARENCE E. WALKER,
Official Reporter.

281 Mr. F. P. SCHMITT, having first been duly sworn, deposes and says as follows:

Direct examination.

First question by Mr. DOOLAN: Please state your name, age, occupation, and place of residence.

A. F. P. Schmitt; 58 years old; merchant; Chicago.

2 b. What, if any, connection did you have during the year or at any time during the year 1879 with The Louisville, Cincinnati and Lexington Railway Company, defendant in this action?

A. I was one of the directors and vice-president.

3. Were you acquainted with the circumstances surrounding the parties at the — contract of lease was made between the Northern division of the Cumberland and Ohio Company, of the first part, and the Louisville, Cincinnati and Lexington Railway Company, of the second part, *was made?*

A. I was acquainted with the circumstances. I don't know what you mean by the circumstances surrounding the parties.

4. The circumstances surrounding the parties?

A. What parties?

6. I will show you a certified copy of the lease to which I have just referred, and call your attention to the fact that a mortgage was made by the Louisville, Cincinnati and Lexington Railway Company of a portion of its earnings; mortgage was made pur-

282 suant to the 6th clause of that lease to secure to the bondholders of the Cumberland and Ohio Railroad bonds the payment of the interest and to provide for a sinking fund and retiring the mortgage bonds held by them, and I will ask you to state what you know respecting the intention of the parties in the execution of that lease and that mortgage. State your connection with the company at the time the lease and mortgage were made.

(Defendant excepts.)

A. What section do you refer me to?

6. I don't care about the lease; state what the intention of the parties was.

A. Well, I don't know. This Northern branch of the Cumberland and Ohio railroad was constructed, as I remember, under the auspices of the Louisville, Cincinnati and Lexington railway. My recollection is that a few counties—I do not know what counties they are now—subscribed a certain amount towards the construction of those roads; that amount was, of course, insufficient to construct them. Bonds were issued; I do not know the amount; probably two or three hundred thousand dollars on the property of the Northern division of the Cumberland and Ohio railroad. Of course,

the question came up as to the payment of principal and interest, and the Louisville, Cincinnati and Lexington, as I remember, entered into an agreement with the bondholders of the Northern branch of the Cumberland and Ohio railroad by which they agreed to apply the net earnings of so much of the bonds as came to
283 them through the construction of the Cumberland and Ohio railroad, and they were to apply the net earnings of such amount to the payment of rentals and principal of that bond. I think that is my recollection; in other words, all business that accrued to the Louisville, Cincinnati and Ohio railroad from the construction of that road was to be applied, so far as the net earnings were concerned, to the payment of interest and the extinction of principal, as fast as the circumstances would permit, I suppose. I don't suppose any money was earned; I don't know whether there was or not. That cuts no figure, though, does it?

7. Did the parties in making that agreement of lease and the mortgage *to* pledge the profits on the business coming in one direction only over the lines of the Louisville, Cincinnati and Lexington, or in both directions?

A. Well, my understanding was that whatever business came to the Louisville, Cincinnati and Lexington, by reason of the construction of that road, was to form the business—was to be counted, of course, not gross earnings, but small profits. The profits resulted to the Louisville, Cincinnati and Lexington by reason of the construction of that line were to be applied toward the payment of interest debt. That is my understanding.

8. Was it believed by the parties that that intention had been effectuated in the lease and mortgage which were executed by the parties; was that or was it not the construction put upon said lease and mortgage?

A. I certainly think that was the impression at the time.

284 9. I will ask you what attitude you maintained toward this projected scheme of completing the construction of the Northern division of the Cumberland and Ohio railroad. Were you in favor of it or were you opposed to it?

A. I was utterly opposed to it from beginning to end.

Cross-examination.

By Mr. HELM:

1. Are you a bondholder now?
A. I am not.
2. How long were you in the railroad business?
A. I was in it for three years or a little over.
3. Do you regard yourself as a practical railroad man?
A. I do not, Mr. Helm.
4. Do you know anything about traffic contracts?
A. No; nothing, except in a general way.
5. You have never been brought in contact with such contracts?
A. No.

6. You know nothing about constructions to be ordinarily placed upon such contracts?

A. No; I know nothing of the details at all.

7. Your idea in this matter is that the Louisville, Cincinnati and Lexington road was willing to pledge whatever it made out of the enterprise toward the support of this leased line?

A. Yes; whatever was made was to go toward keeping that line.

285 8. You did not understand, did you, that it was willing to do more than to pledge what it made out of the enterprise toward keeping the line up?

A. Do you mean to contribute more than its net earnings?

9. Yes; toward keeping up the enterprise.

A. Well, so far as I was concerned, I did not mean to do more. There might have been a disposition on the part of others to do more.

10. Your understanding was that the Louisville, Cincinnati and Lexington was simply putting up all it could make toward the support, if it was needed?

A. Yes.

11. And no more?

—. As to any more, I do not know.

12. So far as you know?

A. So far as I know, certainly. If I voted for that scheme, I certainly had no idea of pledging any more than was made by the Louisville, Cincinnati and Lexington by reason of the construction of the branch line toward the support of the branch line.

Signature of above examination waived.

The deposition of J. K. McCracken, taken on the 21st day of April, 1892, at the office of Helm and Bruce, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence
286 on behalf of the def't in an action between A. L. Schmidt, trus., plaintiff, and L., C. & L. R'y, &c., defendant, now pending in the Lou. L. & equity court.

Appearances: For plaintiff, Judge Simrall; *fro* defendant, Mr. Helm.

J. K. McCracken, being duly sworn, and examined by Mr. Helm, as attorney for the def't, deposed as follows:

Q. What is your age and occupation?

A. My age is fifty-three; I am manager of the L., St. L. & T. R. R. Co.

Q. How long have you been engaged in the railroad business?

A. For thirty-four years; thirty-three last November.

Q. Have you ever been brought into contact with the traffic department of the railroad business; and, if so, for how long a time?

A. I have been for very much the larger part of that time in the

traffic department exclusively—that is, with the freight and passenger department of different roads. For the last six years I have been a part of the time not connected strictly with the traffic department, but for the larger part of the time I have been in the traffic department.

Q. The time within the last six years that you were not connected strictly with the traffic department was when you were holding the position of general manager, above the traffic department?

A. Yes, sir; the time that I was not in the traffic department.

287 Q. As a railroad man and connected with the traffic department of a railroad, have you frequently had occasion to be brought into contact with the question of the distribution of earnings between different lines of road and traffic contracts between them?

A. I have had a good deal to do with that kind of contracts at different times, and in carrying out contracts of that kind.

Q. Where it is the purpose of two roads to give an arbitrary, or to bind a business originating on one road and passing to another, what expression is usually used for the purpose of carrying that purpose into effect?

A. That is in traffic contracts?

Q. Yes.

A. Well, if it was intended to bind, or to provide for a certain arrangement for the business both ways—that is, *for* one road to the other, and the other to that one—the expression would be different from what it would be if it was to bind it in one direction.

Q. What expression or expressions would be used to bind it both ways?

A. For instance, between the L., St. L. & T. and the Ohio Valley railroad, we would say "on business passing between those two roads," or between points on those two roads; but, if it was the business only in one direction, from one road to the other, we would say on business received from or over a certain railroad go-

288 ing to the other; that would be business in one direction only.

Q. If the expression should be used that an arbitrary should be allowed to road A on business going from or over its line to the line of road B, would you think that would allow the first road an arbitrary coming over the other road to it?

A. I would not.

Q. The expression going from or over would be understood in railroad parlance to mean what?

A. I would take it to mean only the business being delivered by road A to road B, for instance.

Q. What would you understand by the word "from" in that connection?

A. That would be from stations on its own line or that could come to it over that line from a connecting line.

Q. What would you understand by the word "over"?

A. That would be business coming over it from points beyond its lines.

Q. In the distribution of the receipts of a railroad are the operating expenses paid first or the interest on the bonds?

A. The operating expenses are necessarily paid first.

Q. That is universally the case, is it?

A. So far as my observation goes.

Q. If it were not the case, the road could not exist?

A. The road could not run; the business would stop.

289 Q. Suppose that the road A were to lease a road B and should agree that if the net earnings on road B were not sufficient to pay the interest and sinking fund, that this road A would, so far as it might do so, make good the deficit from business accruing to it from or over the lines of road B, would you say that road A would be bound thereby to account for profits on business which it carried to road B?

A. No; I should think not.

Q. Suppose, so far from their being net profits on road B, it should fall behind in operating expenses, would road A be, in your opinion, bound to pay the interest on the bonded indebtedness on road B until the operating expenses were first paid?

A. No; not in my view. They would not be bound to pay anything without they were net profits.

Q. If there were net profits, even to the amount of a cent, then the operating expenses would have been taken care of on the leased line?

A. They are paid first.

Q. Your idea is that the main line would not be bound to pay any interest until there should be some net profits on the leased line?

A. I should think not, under that construction.

Q. Is it usual for a main line and a feeding line to distribute the earnings on a mileage basis?

A. No, sir; it is not usual. What you would call a feeding line or a short line connected with another line by traffic arrange-
290 ment is usually allowed an arbitrary rate, either an arbitrary percentage or constructive mileage greater than the actual mileage.

Q. Has that habit become so fixed as to be a custom or not?

A. It is a universal custom, so far as my observation goes. I have never known it to be otherwise in any traffic arrangements, the theory being that the short line or feeding line is entitled to more because they originate the business—entitled to more than the mileage prorate.

Q. Have you ever known any method to be employed in the auditing department of railroads or any department of railroads by which the cost of any particular shipment or business could be ascertained?

A. I have never known it to be attempted except approximately. It would be almost an impossibility to figure it down closely enough

to get at anything more than an approximation. It is not usual in railroad accounting offices to attempt anything of the kind.

Q. Did you ever know it to be attempted?

A. I never did.

Q. Do you think it at all practicable to attempt it?

A. No, sir; I do not think it would be practicable at all.

Q. Please state why it would not be.

A. Well, there are so many different items of cost which are known in the aggregate, and it would be impossible to apportion them fine enough to divide them up into various shipments;

291 if you attempted to pick out certain shipments or certain lines, you would run it into such fine fractions that it would be impossible to do it.

Q. Are railroads constantly increasing their force and increasing their equipments?

A. Yes, sir; that is the tendency of the times. There is a constant increase in station force and in equipment and various items of that kind.

Q. Does this increase take place with reference to any particular business or all the business?

A. The business in bulk.

Q. Can any business at all be done on a road until it is so equipped as to be able to do that business?

A. No; it must be fitted out with equipment and train forces, station forces, station-houses, or places for handling the freight, and all the necessary things that go to make up a railroad before it can do any business. They cannot do any business until these things are provided.

Q. Are those things provided with reference to any particular shipment or with reference to all the business it may do in the future?

A. With reference to its entire business, not any particular part of it.

Q. Have you been shown the railroad map showing the situation of these roads in controversy in this case and of the Northern division of the Cumberland & Ohio as it lies with reference to the geographical situation?

292 A. I am familiar with the geographical situation.

Q. Would you say that the business passing between the L., C. & L. and C. & O. would be a character of business which could be done at anything like the cost which the whole business of the L., C. & L. could be done?

A. No; I should say not. It would all be what might be called local business.

Q. Does it cost more to do local business than through business?

A. It costs quite materially more—that is, local business requires a great deal more handling and it is done in a small way. It usually takes a large number of shipments to make up a car-load, and in handling a local freight train or doing the local freight business over the road it not only requires a larger force, but it takes

more hours to run the same distance on account of the frequent stops to take up freight and unload freight.

Q. It takes more power?

A. It takes more fuel and a larger force of trainmen.

Q. There is quite a difference in wear and tear in stopping the train?

A. Yes, sir; a very material difference.

Q. Any difference in station expenses?

A. The station expenses are very much larger on account of the local business. The through business requires terminal expenses, but not way stations so much.

Cross-examination by Judge SIMRALL:

Q. What is an arbitrary?

293 A. Well, an arbitrary, as used in regard to railroad rates, is a fixed sum instead of a prorate of an indefinite rate.

Q. I will get you to state how that sum is fixed.

A. In making an arrangement, for instance, a long line and a short one, for the receiving of traffic from the short one by the long line, it might be fixed in this way, and is sometimes, that on all traffic originating on the short line they should receive so many cents per hundred pounds to the point of delivery to the long line, but it is more usually done by making a fixed, arbitrary division—a fixed, arbitrary percentage allowed to the short line. If the short line was fifty miles long and the long one two hundred they would have only twenty per cent. of the mileage, but they would be allowed a much larger percentage of the rate.

Q. Who fixes this rate?

A. It is fixed by agreement between the parties.

Q. Can it be done except by agreement?

A. Not in a positive way, but it has become so universal that it would be probably admitted or assumed.

Q. What would be admitted or assumed?

A. That there would be such an arbitrary.

Q. Such a one as what? Have you not said there were various kinds of arbitraries?

A. There are various kinds.

Q. Which one would you assume it would be the custom to allow?

294 A. I want to say this: In saying various kinds, any fixed sum per hundred would amount to the same thing as an arbitrary division, in effect. It is not to be assumed that it would be any certain amount or certain division, but the custom is to make a division with a leased short line.

Q. Does the custom fix any particular sum? Does not the custom vary according to the circumstances of every road?

A. Yes, sir.

Q. Does not it always vary; are there any two cases alike?

A. I could not say about that. The custom is to allow them a larger sum than the mileage would give them.

Q. Without reference to what it might be, sometimes more and sometimes less?

A. That would be a matter of agreement.

Q. It is always a matter of agreement?

A. Yes, sir; the absolute division.

Q. Then what you mean to say is, that there is a custom by which these people agree to make a certain division?

A. It is a universal practice to make this division in that way.

Q. What way?

A. By agreement, fixing a certain amount of arbitrary—they are fixed by agreement, and they are fixed in that way so that the short line gets a larger proportion for their haul.

Q. What do you mean by fixed; who fixes it?

A. That would be fixed by agreement.

295 Q. I want to get the difference between a custom and an agreement. Is that custom anything more than to make an agreement to do that, sometimes agreeing to do one thing and sometimes agreeing to do another?

A. I have never known them to agree to do anything else than that. It may vary in degree, but all the agreement of that kind that I have known, they allowed the short line more than the long line per mile.

Q. Is it not the fact that it is always a matter of agreement?

A. As to amount.

Q. Can any one road say I will pay this amount of that amount, or do this or the other thing without an agreement with the other side?

A. They would have to have an agreement.

Q. When you speak of the word "from" you say that means traffic coming from beyond the branch road. Suppose there is not any traffic?

A. In the case cited by Mr. Helm I would say that.

Q. In case there was no traffic coming from the branch road, what would the word mean?

A. I cannot see that it would have any application at all.

Q. You would not understand it?

A. I could not understand it.

Q. Do these words among railroad men have any different meaning from the public acceptation of them?

296 A. Not that I know of.

Q. You say the word from refers to traffic that comes from beyond the branch road?

A. I would say that would be my opinion.

Q. And if there was no traffic to come over the branch road then the word would not mean anything?

A. I could not say that it would.

Q. How would over imply from?

A. I don't know that I can explain that exactly, but I can tell you my idea. In using the word from we mean coming from the short line to the long line. Over would mean the same thing as the word from.

Q. In your view you consider the word from to mean coming in one direction?

A. I would in that connection.

Q. Then you say that the word over would imply from—make it stronger?

A. It would not add anything to the meaning that I can see at all.

Q. Is it not a fact that an arbitrary allowed to a branch line is due to the fact that the business that comes from the branch line to the main line is one of profit to the main line?

A. No, sir.

Q. Why would the branch line get an arbitrary more than its ordinary proportion?

297 A. They would get it first because there is more expense for the distance than on the other line. The expense of hauling fifty miles on the main line would be less than hauling fifty miles on the branch, and they could not do it for nothing.

Q. If the main line is fully equipped such as the short line was, would not the business coming over a little branch line such as the C. & O. be all profit?

A. No, sir.

Q. Would not it be mainly profit?

A. No, sir.

Q. Why would the L., C. & L. go to the expense of building the branch line for the purpose of having it as a feeder?

A. The business might be profitable, but it certainly would not be all profit.

Q. Of course there would be some expense?

A. Certainly.

Q. But is it not a fact that this arbitrary is given at all the main line to the branch line because of the enormous profit the main line makes from the branch line?

A. Not that I can see. They get this additional business and they can give some additional profit. If the branch line was not built they could not get any of it, but if *it* is built they get some additional business and give some additional profit, which would be an inducement to build it.

Q. How can there be such a thing as an arbitrary given by a main line to a branch line except upon the idea of this excessive profit made by the main line?

298 A. I do not admit that there would be any excessive profit anywhere. There would be some profit, but not excessive profit. They are willing to give this arbitrary to the short line or the branch line, because by so doing they can induce the building and operating of the short line, and the business they get will yield them some profit. If it does not yield any more than they get for it there is no inducement.

STATE OF KENTUCKY:

Louisville Law and Equity Court.

I, Chas. A. Graham, official reporter of said court, do certify that the foregoing deposition of J. K. McCracken was taken, pursuant to agreement, before me at the time and place and in the action mentioned in the caption, the said witness having been first duly sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, bother parties, by attorney, being present, said deposition having been first taken by me in shorthand, and a full and accurate transcript of same having been made by me, read to said witness, the signature of said witness hereto being waived by counsel on both sides.

Witness my hand this 21 day of April, 1892.

CHAS. A. GRAHAM,
Official Reporter.

The exceptions filed by plaintiff to the report of R. E. Sewell (filed April 11, 1892) have been mislaid. By consent the
299 following are copied in this transcript:

Louisville Law and Equity Court.

A. L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., Defendants.

Plaintiffs except to the report or statements filed herein Feb'y 1st, 1892, by R. E. Sewell on following grounds:

1st. The statement, instead of showing the indebtedness of the said Louisville, Cincinnati & Lexington Railway Company down to date of said statement, only pretends to bring it down to 30th June, 1890, and is therefore incomplete.

2nd. All of said statements are erroneous because they do not give to the plaintiffs all the net earnings which the said Louisville, Cincinnati and Lexington Railway Company derived on business coming to it from and over the Northern division of the Cumberland and Ohio railroad.

3rd. All of said statements are erroneous in that in estimating said net earnings referred to in said 2nd exception they each and all deduct from the gross earnings of the Louisville, Cincinnati & Lexington Railway Co. on business coming to it from or over the Northern division of the Cumberland and Ohio railroad a certain proportion of the salaries of all officers and employees and running and other expenses of the Louisville, Cincinnati & Lexington Railway Co., as well as of the Louisville & Nashville Railroad Company and of all other systems and railroads belonging to or under the control of the said Louisville and Nashville Railroad Com-
300 pany, including losses for injuries to persons and property, whereas, under the said contract and mortgage securing said

bonds and interest, no costs or expenses can be legally deducted from said gross earnings, except such as were occasioned by or grew out of said business coming from or over said Northern division of the Cumberland and Ohio railroad.

4th. These statements are erroneous in that the profits realized by the Louisville, Cincinnati & Lexington Railway Company on business coming to it from the Northern division of the Cumberland and Ohio Railroad Company is much larger (and more freight charged therefor) than on the through business of said Louisville, Cincinnati and Lexington Railway Company, and yet in estimating net profits to which pl'ffs are entitled makes no allowance for such larger profits, but prorates these profits with the profits on the through business of the Louisville, Cincinnati and Lexington Railway Company, thereby materially diminishing the net profits to which plaintiffs are entitled.

5th. The said statements are erroneous in that they allow various arbitraries, ranging from 40 to 100 miles, to the Cumberland and Ohio Railroad Company on business coming from it to the Louisville, Cincinnati and Lexington Railroad Company, which is simply a device to take from the bondholders the profits on said business to the Louisville, Cincinnati and Lexington Railroad Company, which are pledged under said mortgage, and give them to the Cumberland & Ohio road to make up the losses in operating that road;
301 all of which is in violation of the contract and mortgage between the parties.

6th. The said statements are erroneous in that they do not give to plaintiffs and the holders of said Cumberland and Ohio Railroad Company's bonds all the net profits of the Louisville, Cincinnati and Lexington Railway Company on its own lines on business coming to it from or over the Cumberland and Ohio Railroad Co., and said statements do not show what said net profits are.

SIMRALL & BODLEY,
Att'ys for Pl'ffs.

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, do hereby certify that the foregoing 227 pages contain a full, true, and complete transcript of the record wherein A. L. Schmidt, trustee, is plaintiff and The Louisville, Cincinnati and Lexington Railway Company, &c., are defendants, number 1860, as the same appears of record and on file in my said office since the last appeal, July 3rd, 1888, up to and including the judgment May 30, 1892, except commissioner's reports, which are contained in volume # 2 of this record, and which said volume # 2 is herewith filed and made part hereof.

I further certify that the 317½ pages contained in this
302 volume # 2 contain a full, true, and complete transcript of the record as embraced in said dates mentioned above.

Witness my hand this 12th day of August, 1892.

JOHN H. WELLER,
Clerk Louisville Chancery Court and ex Officio Clerk of the Louisville Law and Equity Court.

Upon the filing of the foregoing transcript the following statement was made and endorsed:

Kentucky Court of Appeals.

A. L. SCHMIDT, Individually and as Trustee for the Owners of the Bonds of the Northern Division of the Cumberland and Ohio Railroad Company; James McCarty, George H. Breed, P. Booker Reed, J. Duff Reed, as Executor of Eliza S. Reed, Deceased; W. C. Reamer, Jacob Krieger, Sr.; Jane Reed, P. B. Reed, & J. Duff Reed, as Ex'rs of Leander S. Reed, Deceased; George L. Peter, Henry Peter, and G. W. Lewman, as Executors of the Will of Jacob Peter, Deceased, Appellants,
303 *vs.*
LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, Appellee.
} Statement.

This appeal is from a judgment of the Louisville law and equity court of May 30th, 1892, there being no terms in said court. Said judgment is found on pages 50 to 52, inclusive, of this record. The foregoing parties mentioned in the caption are all the appellants and appellees.

The clerk will place this record as a part hereof, the record of a former appeal in this action taken by A. L. Schmidt, trustee as aforesaid, and others against J. Sel. Miller, to be read as a part of this record on the hearing of this appeal.

No summons need be issued and no warning order made on this appeal.

SIMRALL & BODLEY,
Att'ys for Appellants.

At a court of appeals held in and for the Commonwealth of Kentucky, at the capitol aforesaid, on Oct. 4, A. D. 1892, the following order was entered:

A. L. SCHMIDT
v.
LOU., CIN. & LEX. R'Y CO.
} Jefferson.

Ordered that this cause be continued for oral argument.

Afterwards, on March 18, 1893, the following order was
304 entered:

This cause, coming on to be heard, was argued by James P. Helm, for appellee, and J. G. Simrall, for appellant, and submitted.

Afterwards, on June 3, 1893, the following order was entered herein:

Came appellee, by counsel, and on his motion the response to the certiorari heretofore issued herein is ordered to be filed.

Afterwards, on Feb'y 8, 1894, the following judgment was entered herein—

Chief Justice Bennett and Judges Lewis, Pryor, and Hazelrigg presiding:

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, with direction to take the report indicated herein as the basis for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that appellant recover of appellee his cost expended herein.

Opinion and Extension Reported in 95 *Ky., Pages* 289, *&c.*

Afterwards, on March 13, 1894, the following order was entered herein:

305 Came appellants, by counsel, and filed a petition and moved the court for an extension of the opinion herein; and on motion of appellee, by counsel, the time for filing a petition for rehearing herein is extended thirty days; to which appellants, by counsel, objected.

The following is the petition for extension filed by the foregoing order:

Kentucky Court of Appeals.

A. L. SCHMIDT, Trustee, Appellant,
vs.
LOU., CIN. & LEX. R. R. Co., Appellee.

May it please the court:

When the opinion and mandate of this court has been filed in the court below the question will at once arise whether we are entitled to interest on the annual net earnings of the L., C. & L. up to this time.

We think it is very clear under the *contract and opinion* that we are entitled to this interest, and ask the court now to direct that it be allowed, to avoid the delay and expense of another appeal on this point hereafter.

The case was referred to the auditor simply to report the net earnings of the L., C. — L. during these years from the time it had defaulted in payment on interest on the bonds.

306 The report, R. E. S. No. 2, which this court has ordered to be confirmed, shows that the net earnings were so much *each year*, giving the exact dollars and cents, from 1883 to 1890, up to time said report was made.

Now, we say when the court below comes to enter a judgment in pursuance of the opinion and mandate it should be an affirmance of said report, R. E. S. No. 2, with direction to the defendant to pay into court the amount of said net earnings, with interest on the annual earnings, as ascertained by said report, from the time they accrued until paid.

We are really entitled to have the earnings ascertained semi-annually and applied to the payment of the coupons on the bonds, but as the report shows only the annual earnings, we are willing to take it that way.

In the lease, 6th sec., it was expressly agreed that the L., C. & L. would apply these net earnings to the payment of these coupons and to provide a sinking fund for the payment of the bonds.

In the mortgage made in pursuance of that lease (see copy on our brief, p. 9) it is expressly stipulated that if the net earnings of the leased Cumberland and Ohio road are insufficient and all other sources of raising money by that road are insufficient, then the Lou., Cin. & Lex. Railway Co. would supply the deficiency "by appropriating and paying over promptly the net earnings, or so much thereof as may be needed, on its own lines which may accrue by reason of business coming to it from or over said Northern
307 division of the Cumberland and Ohio Railroad Co.'s lines for the purpose of discharging said interest and sinking fund as they severally fall due."

We beg the court to observe this critically. It is not only an *express contract* by the L., C & L. Railway Co. to apply these earnings to pay these coupons, but the contract is to appropriate and pay these earnings "*promptly*," &c., &c., "for the purpose of discharging said interest and sinking *fund as they severally fall due.*"

This is not a question of unliquidated accounts between parties, but even if it were, the rule is as stated in the American & English Encyclopedia of Law, vol. 11, p. 386:

"If an amount is capable of being ascertained, the account is so far liquidated as to bear interest."

There is no question that the amounts could have been ascertained just as they have been ascertained by their own auditor, and they were under a legal duty and obligation to ascertain every six months and apply them to the coupons then due, but this is a case of express written contract to ascertain the amount due every six months and then pay the coupons with it. The law in such case is stated thus in volume — just mentioned, p. 390: "Wherever there is a written contract for a sum of money payable on demand or upon a day certain, interest is payable if payment of the principal sum is not made on demand or at the time agreed on."

But even if there had been no express contract to apply these earnings *every six* months to the coupons "*as they severally fall due*," still there is another principle of law which entitles us to in-
308 terest, stated in same book, p. 397: "Where one has received the money of another and has not the right conscientiously to retain it, the law imposes interest as damages for breach of implied promise to pay it over."

And again, on page 395, same book: "Whenever money has been received by a party which, *ex equo et bono*, he ought to refund, interest follows *as a matter of course*."

Now, will the defendant be heard to say in a court of equity, it is true, according to the report made by my own auditor that, as far back as 1883, eleven years ago, I had in my possession net earnings for that year amounting to $10,000, which I was under written contract to apply at that time to the payment of the coupons then due to plaintiffs; but as they have not coerced this money out of me by judgment until now (although they have been trying so to do for six years), I ought to be allowed to have the use of this money all this time for nothing? In other words, for my breach of faith and contract, I should be rewarded by being allowed to retain $6,000 of interest which I have earned and the plaintiffs lost out of this money which I have wrongfully withheld from them.

Will any court of equity tolerate this? Not at all, but will rather say this is money which was not only due them by express written contract, but it ought, *ex equo et bono*, to have been then paid and "interest follows as a matter of course."

309 It is a case where a court of equity has no discretion, for the law fixes the interest as a matter of necessity where there has been default in payment under a written obligation to pay at a certain time.

But if it were a case where a court of equity had discretion it would never exercise it in favor of a delinquent defendant, such as this, who stands as it were in a trust relation to us, having possession of our money for many years, and having absolute and exclusive possession and control of the books and papers which showed how much we were entitled to, who for eleven years has persistently denied our right to anything, who has resorted to every device known to the law through litigation of six years to defeat this claim, and who is now being finally compelled to disgorge by judgment of the court of last resort in this State.

May it please the court, your attention has never been called to this matter before, because we hoped to have a confirmation of report R. E. S. No. 1, which gave us more than enough net earnings to pay the coupons and provide a sinking fund to pay all the bonds as they mature.

But the report R. E. S. No. 2, which this court affirmed, not only does not give any earnings to create a sinking fund, but does not much more than pay half the interest, so that we think we are clearly entitled to augment this amount by allowing us interest on these annual earnings which the defendant has wrongfully withheld from us so many years.

310 We ask the court simply to extend the opinion by directing interest to be allowed on these annual earnings ascertained by report R. E. S. No. 2.

Respectfully submitted March 13, 1894.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Appellant.

Afterwards, on April 24, 1894, the following order was entered:

Came appellees, by counsel, and filed a petition and moved the court to grant a rehearing, and also filed a response to appellant's petition for an extension of the opinion, and the cause is submitted on the petition and response.

The petition for rehearing is not copied, it not being found among the papers.

311 The following is a copy of response filed by foregoing order:

Response to Petition for Rehearing.

Kentucky Court of Appeals.

A. L. SCHMIDT, Trustee,
vs.
THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO.

I. The opinion in this case was so evidently the result of great deliberation and a thorough investigation and comprehension of the entire record, and so exhaustively covered every point raised in the case, that we felt it would be a waste of time to petition for a rehearing.

Although we claimed and in good faith argued in our original brief that we were entitled to a confirmation of report No. 1, which gave us $213,590.28 of net earnings, the court so far differed with us as to adopt report No. 2, which only gave us $60,192.27—not much more than one fourth of the net earnings which we claimed the defendant had realized and contracted to pay us.

So that if anybody had a right to complain of the opinion it would seem to be the appellants. Not only so, but a careful examination of this record will show that this case was defended and prepared by the L., C. & L. Railway Company (or the L. & N., which is practically the same) on the theory adopted in report No. 2, which this court has approved.

The defendant introduced that theory into the case—under-
312 took to satisfy the court below that it was the true theory, and up to the time the report No. 2 was filed the most the defendant ever expected to accomplish was to bring about the result contained in that report. It took testimony to prove that was the true basis of settlement, and had its own auditor to volunteer a report on that basis to the lower court, and that is the identical report No. 2 which this court has approved. And still the defendant pretends not to be satisfied.

It is no wonder that Brother Helm, in his petition for rehearing, in conclusion says: "Of course we have always felt that we were laboring under a *great handicap* in having to get rid of report No. 2, presented, as *it seems to have been, as a volunteer report* from Mr. Sewell, who was at that time *our auditor*." (The italics are ours).

There is another *great handicap* which we think Brother Helm would feel "*in having to get rid of report No. 2*"—which his client volunteered as the true basis of settlement—and that is that it not

only volunteered this report, but took expert testimony to prove that it was the true basis of settlement.

The defendant introduced Mr. J. W. Baird, the auditor of the Chesapeake & Ohio railroad (Record, p. 23), who testified that he "is of opinion that view 2 presents the nearest approximation to the correct result upon the basis commonly in use among railroad accountants."

The defendant introduced this expert witness for the purpose of proving that report No. 2 was on the true basis, and also that it is the "basis commonly in use among railroad accountants."

313 So that Brother Helm can't "get rid of report No. 2 by saying that Mr. Sewell, the auditor of the great Nashville railroad system, was simply *an accountant* and not a *railroad expert*. It is manifest, too, from his position and from Mr. Sewell's own statement, that he is an expert of high order. He says, in filing his report No. 2:

"The said Robert E. Sewell, having had considerable experience in making up statements of the operating expenses of railroads, suggested to the defendant's counsel that the statement marked R. E. S. No. 1 was not, in his (Sewell's) opinion, correct, as he (Sewell) considered that all business hauled owed its revenue entirely to the running of trains, and that for this reason all such business should bear its *pro rata* of *all expenses*. *The defendant's counsel then requested the said R. E. Sewell* to prepare statements including a proportion of all expenses."

Brother Helm in his petition admits that Sewell "was told by our predecessor, Mr. Barnett, to present a report at the time when he was compelled to present the report No. 1, which should show *his view of the case*."

This proves two things: First, that at that time defendant's attorney considered Mr. Sewell an expert or he never would have directed him to *volunteer "his view of the case"* to the court; second, that at that time (after this litigation had been going on for over six years) the defendant was contending for a settlement on the basis of report No. 2.

314 This court in its opinion did not overlook that fact, but says:

"In addition to the fact that this report (R. E. S. No. 2) shows itself to be the nearest approach to absolutely correct results, its conclusions are approved by the judgment of Baird, Sewell, and others who have devoted years of study to the question at hand."

Brother Helm's petition for rehearing—just as his original brief—ignores all these facts and proceeds upon the false assumption that all the freight handled by the L., C. & L. railroad on account of the Cumberland and Ohio road is what is called *pick-up freight*, which means freight which *is picked up at or delivered to intermediate stations on the lines of the L., C. & L. railway.*

Whereas the record shows that nearly ninety per cent. of it is through freight, going all the way through to either Cincinnati, Lexington, or Louisville, the three terminal points of the road.

And the president of the road, Mr. Milton Smith, says, in answer

to the question "What is the character of freight generally received by the L., C. & L. from the C. & O., Northern division?" Answer. "A large proportion of the tonnage coming to the L., C. & L. from points on the C. & O., Northern division, consists of grain and live stock, is received in *car-load quantities*, and is usually destined to eastern points, thus giving the L., C. & L. railway a *long haul* upon that class of traffic to Cincinnati or Lexington." (See our former brief, p. 47, and see last answer in Mr. Smith's deposition,
315 which is a complete answer to Brother Helm's entire argument as to what he is pleased to call *miscellaneous local freight.*)

The petition proceeds on the further false assumption that arbitraries can be allowed in the absence of a contract therefor. When Mr. Fink and Mr. Milton Smith, defendant's principal witnesses, both testify that "*it is a matter of agreement or contract.*" See extracts from their testimony in our printed brief, p. 40.

On this false assumption the petition devotes many pages to the reconsideration of some of the eight or ten reports varying in their results from over $200,000 of profits to nearly $50,000 of losses, which this court in its opinion most appropriately disposes of in the following language: "It may be admitted that by the exercise of sufficient ingenuity in multiplying the items of expense attending such a business as that of railroading, the actual earnings of a road may be made to vanish in a maze of mathematical calculation."

We will not enter upon a reargument of this case or undertake to answer the petition for rehearing. It is but a revamping of defendant's original printed brief, and every point made has been already thoroughly considered and decided in the opinion of this court.

II. The petition claims that there is an error of fact in
316 report No. 2, which is corrected in report No. 4. It is claimed that report No. 2 charges the defendant with six months' more earnings than the bondholders are entitled to—that is, Brother Helm states that the Louisville and Nashville R. R. Company (which practically owns the defendant's road) bought up all the coupons of that six months and is entitled to apply that six months' earnings as a credit on them. There is nothing practical in the point. The report No. 2 simply ascertains the net earnings which have not yet been applied to the payment of the coupons, and when final judgment *judgment* comes to be entered, if the Nashville road makes it appear that it holds this batch of coupons, it will be entitled to have them credited by this six months of net earnings.

The plaintiff Schmidt is trustee for all the bondholders, and does not know who holds all the bonds or coupons, and it is his duty to see that all these earnings are properly applied.

III. The authorities cited by Brother Helm on the question of interest do not apply to the facts of this case, except the North Carolina case, which lays down the rule that where a debtor knows or *ought to know* that he owes a certain sum and when he is to pay it and fails to pay it he ought to pay interest.

In our case is a written contract to apply these net earnings every

six months to the payment of these coupons. The railroad
317 company knew exactly the amount of the coupons and was bound to know what its net earnings were every six months, because it had contracted every six months to pay them over.

Brother Helm would not certainly contend that interest did not begin to run when the suit was brought. The fact that ingenious lawyers can protract litigation, as this has been done, nearly nine years furnishes no reason why the defendant should not pay us interest on money which it contracted to pay us eleven years ago, and which money the defendant has had the use of and earned interest on all that time. There is no penalty about it; it is simply accounting to us for interest which it has earned on our money.

We ask the attention of the court to the authorities cited by us in the petition for an extension of the opinion. We would not have annoyed the court with that petition, because we believe that interest follows as a matter of necessity from the opinion already delivered, but the amount is large and we wished to avoid any further litigation in the court below.

Respectfully submitted.

SIMRALL & BODLEY,
For Appellants.

April, 1894.

Afterwards, on May 17, 1894, the following order was entered:

The court, being sufficiently advised, delivered a response overruling the petition for a rehearing and extending the opinion herein.

318 Afterwards, on the 22d day of August, A. D. 1895, the appellants, A. L. Schmidt, &c., by their counsel, filed in the clerk's office of the court of appeals a transcript in words and figures following, to wit:

STATE OF KENTUCKY, }
Jefferson County. }

Pleas before the Honorable Sterling B. Toney, judge of the Jefferson circuit court, law and equity division, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned.

ADOLPH L. SCHMIDT, Individually and as Trustee for Owners of Bonds of the Northern Division of the Cumberland and Ohio Railroad Company; Jacob Peter, James McCarty, Geo. H. Breed, P. Booker Reed, Eliza S. Reed, Jane M. Reed, Leander S. Reed, W. C. Reamer, and Jacob Krieger, Sr., for Themselves and Other Owners of said Bonds,

vs.

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., Defendant. } #1860.

Be it known that heretofore, to wit, at a court held for the court aforesaid on the 28th day of May, 1894—

This day came the plaintiffs, A. L. Schmidt, trustee, and others, by attorney, and filed the mandate and opinions of the court of appeals herein.

319 And also filed notice of this motion.

And moved the court to set aside the final judgment herein, which has been reversed, and for confirmation of report of R. E. S. No. 2, and also moved for a rule upon defendant, Louisville, Cincinnati and Lexington Railway Company, to pay into court the sum of $60,192.27, the amount of net earnings shown by report of R. E. Sewell marked "R. E. S. No. 2," together with interest on the said earnings from the time they should have been applied under the contract to the payment of the interest on the bonds, and also to report to the court the amount of net earnings which have accrued each year since the last earnings accounted for in said report marked "R. E. S. No. 2," together with the interest thereon from the time said earnings should have been semi-annually applied to the payment of the coupons in accordance with the said opinions of the court of appeals, and to pay into court the said additional net earnings, with interest thereon, as aforesaid, when ascertained, and also for rule to pay the costs herein.

To which the defendants object.

And said motion is submitted and the court, not being advised, takes time.

At a court held *the* the court aforesaid on the 1st day of June, 1894—

It is ordered that the motion for rule, as prayed on May 28th, 1894, be overruled; to which order plaintiffs except; and it appearing to the court that on the $60,192.27 of earnings ascer-

320 tained by report R. E. S. No. 2 the defendant, Louisville, Cincinnati and Lexington Railway Company, is entitled to a credit of $6,626.65, it is allowed, and it is ordered that the balance of $53,565.62, as shown by said report, together with the interest on the said earnings as they should have been applied under the contract in payment of the interest on the bonds, be paid into court on or before the 11th day of June, 1894, and a rule is awarded against def'ts returnable on the 11th inst. to pay said sums of money and interest into court.

And then came the plaintiffs and moved for a rule on the said defendant to report herein the amount of its net earnings on business coming to it from or over the Cumberland and Ohio road since the time of the last net earnings reported in said report R. E. S. No. 2, together with the interest thereon from the time said earnings should have been applied under the contract in payment of the interest on the bonds, the said net earnings to be ascertained in some way, as in report R. E. S. No. 2.

This last motion was objected to by the defendants and submitted.

Said rule was returned with the following endorsement thereon:

I hereby appoint John T. Gill a special bailiff to execute the within writ. H. A. Bell, sheriff, J. C. June 4, '94.

Affiant, John T. Gill, states that he is a white male person
321 over 16 years of age, not interested in this action nor related to any of the parties thereto, and that the return hereon is true.

JNO. T. GILL.

Subscribed and sworn to before me by John T. Gill this 4 day of June, 1894.

JNO. W. ULLRICH,
Notary Public, Jefferson County, Kentucky.

My commission expires February 12, 1898.

Executed June 4, 1894, on the Louisville, Cincinnati and Lexington Railway Company by delivering a copy of the within rule to M. H. Smith, president of said company, he being chief officer found in this county at this time.

JNO. T. GILL,
Special Bailiff.

At a court held on the 11th day of June, 1894—
Came defendant, by Helm & Bruce, counsel, and filed a response to the rule herein against it.
And same is assigned to the 13th inst. for hearing.
Said response is as follows, to wit:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, Trustee, Plaintiff,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY, Defendant.

The Louisville, Cincinnati & Lexington Railway Company,
322 for response to the rule herein issued against it to show cause why it shall not pay into court the amount of $53,565.62, says that in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges, and franchises, except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets, or funds of any kind with which to comply with the order of this court, and it is therefore unable to pay said sum or any other sum, for the simple reason that it has no property or assets with which to do it.

HELM & BRUCE,
Att'ys for Defendant.

The affiant, J. H. Ellis, states that he is the secretary of the defendant, The Louisville, Cincinnati and Lexington Railway Company, and is the chief officer of said company now in the State of Kentucky, and that he believes the statements of the foregoing response to be true.

J. H. ELLIS.

Subscribed and sworn to before me by J. H. Ellis June 11, 1894.

THOS. B. HARRISON, JR.,
Notary Public, Jefferson Co., Ky.

My commission expires July 10, 1896.

At a court held for the court aforesaid on the 13th day of June, 1894—

On motion of plaintiff, by counsel, it is ordered that this action be, and is, postponed until the 18th inst. for hearing on de-
323 fendant's response to rule.

At a court held on the 18th day of June, 1894—

The court, being advised, delivered a written opinion which is now filed herein.

It is accordingly considered and adjudged by the court that plaintiffs' motion for a rule against defendant to report herein the amount of its net earnings on business coming to it from or over the Cumberland and Ohio road since the time of the last net earnings reported in said report R. E. S. No. 2, together with the interest thereon from the time said earnings should have been applied under the contract in payment of the interest on the bonds, the said net earnings to be ascertained in some way as in report R. E. S. No. 2, be, and is, sustained, and said rule is now awarded, returnable July 2, 1894; to which the defendant excepts.

On motion of plaintiff, by counsel, it is ordered that the response to rule herein be postponed until the 25th inst. for hearing.

Came plaintiffs, by counsel, and moved the court to strike from the files the defendant's response to rule to pay money into court because it is not properly verified and because it is insufficient to constitute any defense to the rule; to which the defendant objects.

And said motion is assigned to the 25th inst. for hearing.

324 Said opinion is as follows, to wit:

Jeff. Cir. Court, Law & Equity Div.

A. L. SCHMIDT ET AL.
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO. } Opinion.

Whatever doubt there might be as to the extent of the relief to which *are* the equities of the original bill and its prayer the plaintiffs are entitled, it is clear that under the prayer of the amended petition filed on the 26th of Jan'y, 1891, which is both specific and comprehensive, and the opinion and mandate of the court of appeals in this case, the plaintiff is entitled to the relief sought to be enforced by his motion, to wit, to a full report and disclosure of the net earnings and interest up to date of final judgment, to the end that the same may be applied as adjudged by the court of appeals. The plaintiffs' motion is sustained.

STERLING B. TONEY, *Judge.*

Said rule was returned with the following endorsement thereon: Executed June 21, 1894, on Louisville, Cincinnati and Lexington R. R. Co. by delivering a copy of the within summons to M. H. Smith, president of said company, he being chief officer found in this county at this time. H. A. Bell, S. J. C., by W. B. Thixton, D. S.

325 At a court held for the court aforesaid on the 25th day of June, 1894—

On motion of plaintiffs, by counsel, it is ordered that this case be, and is, postponed until July 2nd, 1894, for hearing on pending motions.

At a court held for the court aforesaid on the 2nd day of July, 1894—

Came defendant, by counsel, and filed a response to the rule herein against it.

Came plaintiffs, by counsel, and moved the court to set aside so much of the order herein for a rule *vs.* the defendant as allows said company any credit on the amount ascertained by report, R. E. S. No. 2.

And further moved the court to compel the defendant to make its response to rule to pay money into court more specific and to show to whom the alleged sale was made and how and the terms, and to show what has become of the earnings reported herein.

And further moved the court to strike from the files the response to rule this day filed herein.

To all of which the defendant objects.

By consent of parties, by counsel, it is ordered that the response to rule filed by defendant on June 11, 1894, and the response this day filed be, and are, heard together.

And this action, having been heard on response to rule
326 and on pending motions, is submitted.

Said response is as follows, to wit:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, &c., Plaintiff,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY, Defendant.

The defendant, The Louisville, Cincinnati & Lexington Railway Company, responds to the rule against it to show cause, if any it has or can, why it should not be compelled to report herein the amounts of its net earnings on business coming to it from or over the Cumberland & Ohio road since the time of the last net earnings reported in said report, R. E. S. No. 2, together with the interest thereon from the time said earnings should have been applied, under he contract, in payment of the interest on the bonds — states and shows to this court that it has not made any net earnings or earnings of any kind since the date aforesaid on business coming to it

from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever and has not since the date aforesaid.

HELM & BRUCE,
Att'ys for Defendant.

M. H. Smith says he is the president of the defendant, and that he believes the statements contained in the foregoing response are true.

M. H. SMITH.

327 Subscribed and sworn to before me by M. H. Smith this 28 day of June, 1894.

THOS. B. HARRISON, JR.,
Notary Public, Jeff. Co., Ky.

My commission expires July 10, 1896.

At a court held for the court aforesaid on the 17th day of December, 1894—

The court, being advised, delivered a written opinion, which is now filed herein.

It is accordingly considered and ordered that plaintiff's motion to make the second response more specific be, and is, overruled; and

It is further ordered that plaintiff's two motions to strike the response of the defendant from the files be, and each of them are, overruled, to all of which the plaintiff excepts.

Said opinion is as follows, to wit:

Jefferson Circuit Court, Law & Equity Division.

ADOLPH SCHMIDT, &c., as Trustee, &c., ET AL.
vs.
L., C. & LEX. R. R'D CO.

This submission is as follows:

1st. On plaintiff's motion to strike from the files the response to the rule to pay into court money (earnings) to satisfy the plaintiff's claim under the contract sued on.

2nd. On plaintiff's motion to compel defendant to make its response more specific.

328 3rd. On plaintiff's motion to strike from the files the last response to rule on defendant to report net earnings since last report of 1890 under the contract sued on.

Upon the 1st and 3rd motions the statements of the responses must be taken as true. The motions to strike are equivalent to demurrers. They admit the allegations of the response, but deny that such allegations even when taken as true are a var to the rule. The petition in this action was filed on the 12th of October, 1885, by the plaintiffs against The Louisville, Cincinnati and Lexington Railway Company, defendant, on a contract and supplemental contract dated, respectively, June 28th, 1879, and —day of January, 1880,

by the plaintiff, for himself and as trustee for the holders of bonds issued under said contracts, to compel the application of the net earnings of the Northern division of the Cumberland and Ohio Railway Co. and the net earnings of the Louisville, Cincinnati and Lexington Railway Company which may have accrued and might thereafter accrue to it by reason of business coming to it over the line of the Northern division of the Cumberland and Ohio Railroad Company to the payment of the interest and coupons on the said bonds issued as aforesaid under said contracts and held as aforesaid by the plaintiff for himself and as trustee for other bondholders. From the institution of this action on the 12th of October, 1885, to the present time it has been prosecuted against the defendant, The Louisville, Cincinnati and Lexington Railway Company. The
329 defendant, as it had a perfect right to do, contested its liability as claimed and propounded by the plaintiff under the contract sued on. It denies that under the contract sued on the net earnings on business going both ways were covered by the bonds and should be applied to the payment of the interest and coupons of said bonds, and it denied any liability at all to the bondholders until after the loss in operating the Cumberland and Ohio, Northern division, had been paid.

These were the legal issues between the parties to this litigation in the determination of which so much time has been consumed. The case has been to the court of appeals, upon these issues of law, and the same have been settled. It was the character and extent of the legal liability of the defendant to the plaintiff, under the contract sued on, that the parties have been litigating all these years.

Its liability was purely a contingent one, and this contingent liability was only secure and by a contingent lien, not upon any existing estate of the defendant, real, personal, or mixed, but upon future contingent profits. It is not perceived upon what principle of pleading or of law the defendant was bound to allege, as a defense to the plaintiff's suit, that it had sold the railroad and was no longer operating it. Its liability, under the contract, was not affected by its sale of the railroad. The sale itself was duly recorded and notice thereof thereby given to the world. Yet through these ten years of litigation, amid all the various amendments and motions and counter-motions that swell this voluminous record, we find no motion by the plaintiff to bring this
330 purchaser of record before the court by making it a party to the suit.

The fact that the president of the corporation which bought the railroad was at the time the president of the corporation that sold it does not operate to consolidate the two corporations, nor to interrupt the passage of the title from one to the other, nor does it bind or affect the purchasing corporation by the orders or judgment rendered against the vendor corporation in a suit upon a contract to which the purchasing corporation was neither a party nor privy.

There is no element of estoppel or contempt of court in the de-

fendant's failure to plead that it had sold the railroad from the earnings of which the plaintiff was seeking satisfaction of its coupons. The defendant, in resisting the plaintiff's construction of its liability under the contract, was not bound to plead that it was insolvent and not operating the road which it had sold. Neither its corporate existence nor liability under the contract sued on was affected by either or both of these facts.

It is as contempt of court for a defendant who has vigorously resisted the obtention of a judgment under a contract to respond to a ruling compelling it to pay the amount of the judgment into court by saying that it has no money or other property with which to satisfy the judgment, and is therefore financially unable to satisfy the judgment, and thereby comply with the order of court.

The response, indeed both responses, of the defendant which
331 are sought by the motions under consideration to be stricken simply state that the defendant sold in 1881 and conveyed for a valuable consideration all of its corporate property except its franchise, and distributed the proceeds of such sale among its various stockholders, and that since said sale in 1881 it, the said defendant, has had no property, assets, or funds of any kind with which to comply with the order of court requiring it to pay certain net earnings into court; that since said sale it, the said defendant, has not made any net earnings of any kind since the last net earnings reported in said report, R. E. S. No. 2, on business coming to it from or over the Cumberland and Ohio road, nor has it made earnings of any kind; that it does not nor has it owned any railroad or property of any character whatever since said *said* last report nor since the sale of its corporate property and assets in 1881 and the distribution by it of the proceeds of said sale among the stockholders as aforesaid. If these statements of said responses are true and the motion to strike them from the file admits them to be true, they must be adjudged and held to be sufficient unless the court shall attempt to enforce such a money judgment by imprisonment for debt through and by the means of proceedings for contempt. This cannot be done in this State upon a contract claim such as forms the basis of this suit.

It is objected that the jurat or verification of the response filed June 11 is not legal or sufficient. It is sworn to by the secretary, J. H. Ellis, who states in his verification that he is the secretary of
332 the defendant company and is or was at the time of making the jurat the chief officer of the defendant company in the State of Kentucky, and that he believes the statements of the said response to be true.

The court is unable to detect any defect in said verification and holds it to be good.

It is objected that the two responses are not sufficiently specific. They state specific facts which if true *or* are a bar to further proceedings under the rules to which they are responsive.

Suits are only prosecuted against the *defendants of record* who have been served either actually or constructively with process and are before the court. Relief can only be granted against those

parties defendant who are defendants of record and against whom relief is prayed.

A cannot sue B and get a judgment against C, who is not a party of record to the suit nor in any way before the court nor in anywise connected with nor privy to the contract between A and B on which the action is brought. It seems to the court that the case cited by learned counsel for the plaintiff of Heckman's Adm'r. *vs.* The Louisville and Nashville Railroad Co. does not sustain their contention, but, on the contrary, is an authority against them. That was a mistake in the caption of the petition in giving the wrong name of the defendant. In that case the real defendant appeared and filed its answer. The court held that at common law and under section 134 of Civil Code the pleading could be amended by inserting the correct name. How radically different the case under
333 consideration. The Louisville & Nashville Railroad Company is not a party to the contract sued and is not bound by nor affected by any of the covenants, conditions, and obligations therein contained. Had it been sued instead of the defendant, The L., C. & L. R. R. Co., it is manifest the petition would have been demurrable.

It has never entered its appearance to this suit, and on objection would not have been allowed to do so.

The action was not commenced nor prosecuted against the Louisville and Nashville Railroad Company, but against a wholly different corporation—the Louisville, Cincinnati and Lexington Railway Company—upon a contract to which the Louisville and Nashville Railway Company was not a party and in which it neither had nor could have any interest. In the Heckman case, on the facts stated in the petition, the Louisville & Nashville Railroad Company was primarily liable. The petition stated the cause of action against the Louisville & Nashville railroad in tort for negligence resulting in Heckman's death. Not so in the case at bar. The petition does not state a cause of action against the Louisville and Nashville Railroad Company, but it states a cause of action *ex contractu* against another and a distinct corporation upon a contract to which the L. & N. R. R. Co. was not a party and in which it neither had nor could have any interest under said contract. There is no analogy between Heckman's case and the case at bar.

It results that plaintiffs' three motions, one to make the
334 second response more specific and the other *two* strike the responses of the defendant from the file, are each and every one overruled. Exceptions reserved to plaintiffs to the rulings of the court.

STERLING B. TONEY, *Judge.*

At a court held on the 24th day of December, 1894—

Came plaintiffs, by counsel, and on their motion ordered that time until and including January 7th, 1895, be and is given them within which to reply to the response herein.

At a court held on the 7th day of January, 1895—

Came plaintiff, by counsel, and filed a reply to the response of defendant herein.

Said response is as follows, to wit:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO. ET AL., Defendants.

Pl'ffs' Reply to Responses of Def't Louisville, Cincinnati and Lexington Railway Co.

Plaintiffs, for reply to the responses of def't Louisville, Cincinnati and Lexington Railway Co. to the rule to pay money into court and to report earnings since 1890, den*ies* that the de-
335 fendant in 1881 or at any time sold or conveyed its property or rights or privileges or franchises, except the mere franchise to exist, or that it distributed the proceeds of such sale among its stockholders; and plaintiffs deny that since said alleged time said defendant has had no property or assets or funds of any kind, and den*ies* that said defendant now has no property or assets with which to pay plaintiffs' claim herein; and the plaintiffs deny the allegation that since 1890 the said defendant has not operated said railroad nor made any earnings.

Plaintiffs say that said defendant has never made any legal or other sale of said railroad or property, and the said road has been continuously operated in the name of said defendant.

A. L. SCHMIDT.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Pl'ffs.

Subscribed and sworn to by A. L. Schmidt, trustee, Jan'y 7, 1895. My commission expires May 20th, 1896.

JOHN C. DOOLAN,
N. P., J. Co., Ky.

At a court held on the 27th day of May, 1895—

Came plaintiff-, by counsel, and gave notice as required by rule of court—

And moved the court for leave to withdraw (without leaving a copy thereof) their reply to the response of defendant Louisville, Cincinnati and Lexington Railway Company to rules issued against it; which reply was filed herein on January 7th, 1895.

336 And plaintiffs further moved the court to file herein their amended and supplemental petition making the Louisville and Nashville Railroad Company a party defendant to this suit; to all of which defendants object.

And by consent of parties, by counsel, it is ordered that this action be and is assigned to the 28th inst. for hearing.

At a court held on the 28th day of May, 1895—

On motion of plaintiff-, by counsel, it is ordered that this action be and is postponed until the 31st inst.

At a court held on the 31st day of May, 1895—

This action coming on to be heard on motion of plaintiffs to withdraw its reply to defendant's response to rule and also to file an amended and supplemental petition herein making the Louisville and Nashville Railroad Company a party defendant herein, and the court being advised, it is ordered that said motion be overruled, and the court refused to allow said amended petition to be filed or said Louisville and Nashville Railroad Company to be made a party defendant herein; to which ruling plaintiffs except, and leave is given to plaintiffs to file a bill of exceptions herein.

And then came plaintiffs at once and tender and file said bill of exceptions, which is now examined, approved, signed, sealed, and enrolled and ordered to be made part of this record without being spread at large on the order book, which is accordingly done.

337 And then came plaintiffs and prayed an appeal to the court of appeals from the order herein made overruling their motion to withdraw their reply and to file the amended and supplemental petition above mentioned, and refusing to allow said Louisville and Nashville Railroad Company to be made a party defendant to this action, which appeal is granted.

Said bill of exceptions is as follows, to wit:

Jefferson Circuit Court, Law and Equity Division.

A. L. SCHMIDT, Trustee, and Others, Plaintiffs,
vs.
LOUISVILLE, CINCINNATI AND LEXINGTON RAILROAD COMPANY and Others, Defendants.

And then come plaintiffs at once and tender and file said bill of exceptions.

Be it remembered that on the — day of May, 1895, the plaintiffs moved the court to withdraw their reply to defendants' response; which reply is in words and figures as follows, to wit:

Said reply is copied on page 15 of this record.

And plaintiffs further moved to file an amended and supplemental petition herein, which is in words and figures as follows, to wit:

Jefferson Circuit Court, Law & Equity Division.

ADOLPH L. SCHMIDT, Individually and as Trustee for Bondholders of the Northern Division of the Cumberland and Ohio Railroad Company; Jacob Peter, James McCarty, George H. Breed, P. Booker Reed, Eliza Reed, W. C. Reamer, and Others, for
338 Themselves and Other Owners of said Bonds, Plaintiffs,

vs.

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY & Louisville & Nashville Railroad Co., &c., Defendants.

} Amended Petition.

Plaintiffs, for themselves and all other holders and owners of the bonds hereinafter mentioned, state:

That on the 28th day of July, 1879, the Northern division of the Cumberland and Ohio Railroad Company, a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, and thereby authorized to construct, maintain, and operate the railroad and property hereinafter mentioned, and by an act approved the 18th day of March, 1878, authorized to make and enter into the lease, mortgages, and agreements hereinafter mentioned, executed, acknowledged, and delivered to the Louisville, Cincinnati & Lexington Railway Company, a corporation duly created by an act of the General Assembly of the Commonwealth of Kentucky, and by the said General Assembly of the Commonwealth of Kentucky duly empowered to make and enter into the lease, contract, and mortgages hereinafter mentioned, an indenture of lease in writing, which was then and there received and accepted by said lessee, wherein the said lessor let to the said lessee all that part of said lessor's unfinished road-bed, rights of way, with improvements and appurtenances, *deposits*, and depot grounds, machinery, tolls, and implements, together with all its property, rights, and franchises, including unpaid subscriptions to capital stock, deeds, and demands be-
339 longing to or in anywise appertaining to said lessor's line of railway from its intersection with said lessee's railway at the town of Eminence, Kentucky; thence southwardly through a portion of Henry county and the counties of Shelby and Spencer, and to Bloomfield, in Nelson county, all in the State of Kentucky, for the period of 30 years from the date of said lease, upon the terms and for the consideration of the mutual covenants and stipulations expressed in said lease.

In said indenture it was stipulated that the president and directors of the lessor should execute, under the direction of the stockholders, a mortgage upon all the property, rights, and franchises belonging to or in anywise appertaining to said lessor's line of road aforesaid for the security of $350,000 of mortgage coupon bonds, to run 20 years, and bearing interest at the rate of 7 per centum per annum, payable on the 1st days of June and December in each year, to be executed by the lessor as provided in its charter and delivered to the lessee within 60 days after delivery of said lease.

In said lease the lessee stipulated that said bonds or proceeds should be used by it in the construction of said lessor's said line of railway, and for no other purpose; that should the lessee be unable to dispose of $250,000 face value of said bonds, the proceeds to be in money, materials, or labor, by September 1st, 1880, said lease should terminate and the parties thereto be released and the lessee restore to the lessor all said bonds; provided that no absolute sale
340 of any of said bonds should be made by the lessee unless or until it could place not less than $250,000 in value thereof in money or its equivalent, and when that quantity thereof should have been disposed of by lessee it should, as soon as practicable and not later than September 1st, 1880, begin the construction of said lessor's said line of railroad, and that a failure to so begin should operate to terminate said lease; that upon disposing of $250,000 of said bonds as aforesaid the contract should be binding on the parties and the line from Eminence to Bloomfield be commenced, and when begun should be pushed to completion as rapidly as possible; that no bonds should be sold with past-due coupons annexed.

That the line of railroad constructed should be first class; that the lessee should furnish all necessary engines and rolling stock to operate the railway at the price agreed on, but the lessor reserved the right to furnish such part thereof as it could at same compensation.

It was stipulated that the lessee should make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping road-bed in order, and the net profit arising therefrom should be applied to the payment of interest and provide for sinking fund and retire said mortgage bonds; but out of the gross earnings should be first deducted annually $1,000, which should be paid to lessor with which to pay expenses of keeping up its organization, and if the net earnings should prove insufficient to pay interest and provide for sinking fund afore-
341 said the lessee, if all other sources of raising money of said lessor should prove insufficient, should supply the deficiency as far as it might be done by appropriating the net earnings or so much as might be needed on its own lines which might accrue by reason of business coming to it, said lessee, from or over said lessor's lines, and that such pledge and agreement should be made effectual by mortgage properly executed, acknowledged, and recorded, and should it become necessary to use any of the net earnings on the lines of the lessee to pay said interest and sinking fund or any part of either, then all amounts so used, as well as all moneys paid for said lessor by said lessee, should be treated as interest-bearing debts, interest at the same rate as said mortgage bonds should bear, the debt and interest to be repaid out of said net earnings thereafter accruing to said lessor on its own lines which might be so appropriated consistently with the other terms of said lease, and for all sums of money that might become due from said lessor to said lessee on this or any account a lien should be and was thereby created upon all the property, rights, and franchises of said lessor owned or to be

acquired in favor of said lessee, to stand next in priority to said mortgage and bonds for $350,000 as aforesaid, but said lessee should not enforce the collection of said debts or any of them by enforcement of said lien until at least eight years should have elapsed from and after the creation of the same.

342 It was stipulated that whenever the net earnings from the leased premises should suffice to pay the interest and sinking fund on said $350,000 of bonds or such portion thereof as might be outstanding and to repay said lessee all dues and demands when due or owing, the surplus net earnings, unless used in retiring said bonds, as provided in said mortgage, less one-tenth thereof, should be paid over to said lessor, said one-tenth of said net earnings to be retained by said lessee for its own use.

It was stipulated that said lease should not be assigned without the lessor's consent, and that during its duration the lessee should pay all taxes lawfully assessed and charge the amount to operating expenses, and should restore the leased premises to lessor in good repair at the termination of the lease unless extended by mutual consent or the lessee be prevented by unavoidable casualty, legal proceedings, or operation of law.

It was stipulated that the lessee should furnish any means necessary to complete the line from Eminence to Bloomfield which should not be derived from the sale of the bonds to be issued by the lessor, and should furnish any means necessary to pay any interest to become due on said bonds previous to completion of said line which might not be derived from the earnings of said road. Any means so furnished by lessee to become a lien debt payable on the same terms as previously provided in regard to its other indebtedness against lessor.

343 It was stipulated that if the lessee were hindered in beginning or completing the railway by act or omission of the lessor or by legal or equitable proceedings the period or periods of such delay should not be counted as part of the time within which the lessee was obliged to perform any act under the agreement.

Plaintiff further states that afterward, to wit, on the same day, to wit, the 28th day of July, 1879, the said lessee executed and delivered to Joshua F. Speed, as trustee, an indenture of mortgage, wherein, among other things, it was provided—

That whereas, by authority of an act of the General Assembly of the Commonwealth of Kentucky approved the 18th day of March, 1878, the mortgagor had contracted with the Northern division of the Cumberland & Ohio Railroad Company for lease, construction, and operation of the latter's railway from Eminence, aforesaid, through a part of Henry county and the counties of Shelby and Spencer to Bloomfield, aforesaid, said lease to continue for thirty years on the terms specified, in which it was stipulated on behalf of the lessor that if the net earnings of the leased premises should prove insufficient to pay the interest and provide the sinking fund of 350 bonds of $1,000 each, bearing interest at seven per cent. per annum, payable semi-annually on the 1st days of June and December, running twenty years from July 2nd, 1879, to be issued by said

lessor, and if all the sources of raising money of said lessor
344 fail to provide for said interest and sinking fund, then the said mortgagor, Louisville, Cincinnati & Lexington Railway Company, should supply the deficiency, so far as might be done, by appropriating the net earnings, or so much thereof as might be needed on its own lines, which might accrue to it by reason of business coming to it from or over the said lines of the said Northern division of the Cumberland & Ohio Railroad Company; and whereas the contract of lease had been consummated by action of the stockholders of the lessor and it was desired to carry into effect said stipulations as to said net earnings, said mortgagor, in consideration of one dollar cash in hand paid to it by said Speed, trustee, and of the premises, thereby mortgaged and put in lien all net earnings which might accrue to it by reason of business coming to it from or over said lines of the Northern division of the Cumberland & Ohio Railway Company to said Johsua F. Speed, as trustee, aforesaid (who it was recited in said mortgage was the trustee for the mortgage made by said Northern division of the Cumberland & Ohio Railroad Company to secure said 350 bonds of $1,000 each), conditioned that if the net earnings of said leased premises should prove insufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said mortgagor, if all other sources of raising money of said lessor prove insufficient, would supply the deficiency, so far as it might be done, by appropriating and paying over promptly the net earnings or so much thereof as might be needed on its own lines which might accrue by reason of business coming to it from
or over said Northern division of the Cumberland & Ohio
345 Railroad Company lines for the purpose of discharging said interest and sinking fund as they should severally fall due.

Said indenture of mortgage was duly acknowledged by said mortgagor, Louisville, Cincinnati & Lexington Railway Company, before and recorded by the clerks of the county courts respectively of Spencer, Shelby, Henry, and Jefferson counties, in their respective offices, and a copy of said mortgage is filed as Exhibit "C" with the petition and made a part hereof.

Plaintiffs further state that pursuant to the terms of said lease the said lessor on or about the — day of July, 1879, delivered to the said Joshua F. Speed, trustee, a deed of mortgage which was duly acknowledged before and recorded by the clerks of the county courts of Spencer, Shelby, Henry, & Jefferson counties, in Kentucky, copy of which said mortgage is herewith filed and made a part hereof, marked "A," wherein said Northern division of the Cumberland and Ohio Railroad Company conveyed to said Speed, trustee, all the property, rights, and franchises of said mortgagor, including all its right, title, and interest, free from all lien, mortgage, or claims of any kind, in and to its lines of railroad from its point of intersection with the line of road of the Louisville, Cincinnati & Lexington Railway Company, in the town of Eminence aforesaid, through Henry, Shelby, and Spencer counties, and to Bloomfield, in Nelson county aforesaid, together with all improvements, appurtenances, rights of way, lands adjacent thereto, machinery, tools, and imple-

ments, fixtures, and supplies of every description, so as to vest
346 in the said Speed, trustee, all the right, title, and interest of the said Northern division of the Cumberland & Ohio Railroad Company in and to all the property by its owners or in which it had any interest at the date of the execution of said mortgage or thereafter to be acquired by it. Said conveyance was made to secure the payment of 350 bonds by said mortgagor issued for $1,000 each, dated July 2nd, 1879, payable 20 years after date, in each of which said mortgagor premised to pay bearer $1,000 20 years thereafter, with interest at the rate of seven per centum per annum, payable semi-annually. By said mortgage it was provided that all said property so conveyed should be held by said trustee for the joint and equal security of the principal and interest of each of said bonds without regard to the time when said bondholders might become possessed thereof.

By said mortgage it was provided "that in the event of the death, resignation, failure, or refusal to act of said Speed, trustee, as aforesaid, it should and might be lawful for the Shelby circuit court, upon the application of the parties holding said bonds to the amount of $70,000 or more, to appoint a trustee or trustees in lieu and stead of said Speed, and that the trustee or trustees so appointed should thereupon succeed to and be vested with all the rights, powers, and privileges which were by said deed of mortgage conferred upon said Speed, or intended so to be."

Plaintiffs state that afterward, to wit, on the — day of January,
1880, and after the delivery of said lease and both said mort-
347 gages, the said Northern division of the Cumberland and Ohio railroad, as first party, the said Louisville, Cincinnati & Lexington Railway Company, as second party, and said *Josephua* F. Speed, trustee, as third party, made, executed, and delivered, each to the other, a certain contract in writing wherein, among other provisions, it is recited and stipulated—

"That for and on account of the difficulties of carrying into effect the contract of the parties of the first and second parts hereto in relation to the lease, construction and operation of the said first parties' proposed line of railway from Eminence to Bloomfield, of date the 28th day of July 1879, said parties have and do hereby agree upon the following change and modifications of said contract and the mortgage therein named to take effect when and as soon as this change and modification shall have been duly and properly approved by majority of the stockholders of each of said companies and fully executed and recorded in the proper offices, when to all intents and purposes the said contract so amended and modified shall be recorded and taken as the true contract and agreement between the parties hereto:

First. Whenever said second party shall be able to dispose of said mortgage bonds provided for in said contract and mortgage amounting at their face value to the sum of $150,000 said bonds numbered from one to 150 inclusive, the proceeds in money, labor or mate-
rials, the same may be done, and then this contract as
348 amended and in all its particulars becomes absolute and the construction of that portion of said first party's line of rail-

way between Shelbyville and Bloomfield shall be commenced and pushed to completion as rapidly as possible; and the failure to complete said road so as to permit the safe and regular passage of trains between Shelbyville and Bloomfield within two years from the commencement of work thereon shall at the option of said first party after six months' notice thereof operate as a forfeiture of said lease. But no disposition of any of said bonds shall be made until not less, in amount, that $150,000 at the face value thereof numbered as aforesaid can be placed for money or its equivalent.

Second. Not more than two hundred and fifty thousand dollars of the face value of said bonds, numbered from 1 to 250 inclusive, shall be used or disposed of in and about the construction of said railroad between Shelbyville and Bloomfield, and one hundred thousand dollars of the face value of said bonds, numbered from 251 to 350 both inclusive, shall be set apart and faithfully preserved in such manner as the boards of directors of the first and second parties may agree, for the ultimate construction of said first party's road between Eminence and Shelbyville but said second party shall not be bound to begin the construction or operation of said last-named portion of said railroad until in the judgment of the board of the said second party, the operation of the same would result in sufficient earnings to pay operating expenses and interest and sinking fund on the amount required to com-
349 plete the same. And the mortgage heretofore made to Joshua F. Speed, trustee therein, is hereby so modified that the said two hundred and fifty bonds to be used in constructing said railroad between Shelbyville and Bloomfield shall constitute no lien on that part of said company's road between Eminence and Shelbyville until said one hundred bonds set apart for its construction shall have been used for that purpose, and then all of said bonds issued shall be a joint and equal lien on the whole property as set out in the original mortgage and the said Speed as trustee, is made a third party hereto and shall sign this contract as evidence of his consent, to the modifications in this respect of the said mortgage, it being agreed and understood that at this date none of said mortgage bonds have been sold or disposed of, but remain in the hands of said second party, provided that unless the second party shall complete the construction of so much of said party's road as lies between Shelbyville and Eminence within five years from the first of September, 1880, then the lease of said last-named part of said road shall determine and terminate at the option of said first party after six months' notice, and in the event of such termination of the lease said bonds numbered from 251 to 350 both inclusive aforesaid and the coupons thereof shall at once be cancelled so as to prevent their circulation or if the boards of the parties aforesaid so order it they shall be destroyed.

Third. Before any of said bonds numbered from 1 to 250, both inclusive, shall be sold or disposed of, each shall have a
350 printed or lithographed endorsement thereon to the effect that none of them or their coupons have any lien upon the company's property or franchise or lien of said road north of Shelby-

ville until the one hundred bonds aforesaid are issued or used, and that portion of said road between Shelbyville and Eminence shall have been completed, and then all of said bonds and coupons shall have a common and joint lien on the whole property.

Fourth. The board of directors of the first and second parties may agree to use second-handed rails in building said road or any part of it, said rails to be sufficient for the safe transmission of trains and to be removed and replaced as fast as they became unsafe. The price of said second-handed rails to be agreed upon by said boards before being used.

Fifth. In all respects in which this contract is inconsistent with the original contract or mortgage said originals are abrogated and the contract as modified and amended by this agreement shall be taken as the true existing contract between the parties."

A copy of said contract is filed herewith and made a part hereof, marked "D." It was signed, acknowledged by said Northern division of the Cumberland & Ohio Railroad Company and Joshua F. Speed before and recorded by the clerks of the county courts of Spencer, Shelby, Henry, and Jefferson counties aforesaid; and the modifications mentioned therein of the contract between said Northern division of the Cumberland and Ohio Railway Company and Louisville & Cincinnati & Lexington Railway Company were duly and properly approved by a majority of the stock-
351 holders of each of said companies in meetings duly called and assembled.

Plaintiffs state that in accordance with the provisions of said mortgages, lease, and contract said bonds and coupons were prepared, signed and countersigned, and made ready for use, as in the charter of said Northern division of the Cumberland & Ohio Railroad Company and said mortgage of date July 2nd, 1879, provided, and 250 of said bonds of $1,000 each were issued and delivered to said lessee within sixty days after the delivery of said deed of lease, in each of which bonds it is provided "the Northern division of the Cumberland & Ohio Railroad Company hereby promises to pay Joshua F. Speed, trustee, or bearer, the sum of one thousand dollars on the 2nd day of July, 1899, at the Bank of America, in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable at the same place on the 1st day of June and December of each year as per coupons annexed, on presentation of said coupons. This is one of a series of three hundred and fifty bonds numbered from 1 to 350, both inclusive and lettered A, and is secured by mortgage dated the 2nd day of July, 1879, made, executed, and delivered by said Northern division of the Cumberland & Ohio Railroad Company to Joshua F. Speed as trustee, in pursuance of an act of the General Assembly approved the 18th day of March, 1878. The holder of this bond together with the holders of the others of said series is entitled to a first lien for the equal security of princi-
pal and interest of each respectively on all the property,
352 rights, and franchises of said Northern division of the Cumberland & Ohio Railroad Company, as also a first lien on the net earnings of the Louisville, Cincinnati & Lexington Railway

Company duly pledged thereto, which may accrue to it by reason of business coming to it over the line of the mortgagor," the said Northern division of the Cumberland and Ohio Railway Company.

Attached to all said bonds were coupons providing for the semi-annual payment of interest on the respective bonds as aforesaid. Plaintiffs state that before the 1st day of September, 1880, said lessee disposed of so many of said bonds numbered from one to 250, both inclusive, as amounted at their face value to $250,000, the proceeds being money, materials, and labor, and so notified the president of said lessor in writing.

Said lessee, for value, sold and transferred said 250 bonds to divers persons upon the bond market, and the plaintiffs and many other persons unknown to plaintiffs became the purchasers thereof, and are the owners and holders of said bonds aggregating many thousands — dollars, as stated in the petition.

Plaintiffs state that none of the interest on or coupons attached to said bonds which became due after December 1st, 1885, has been paid to any of the plaintiffs, and they are informed and believe and aver that no such payment has been made to any other owner of said bonds or coupons; that they demanded of said lessee
353 payment of said accrued interest, but payment was refused by said lessee, which denied any liability to pay said bonds or any of them, and said lessor has likewise refused such payment.

Plaintiffs are informed and believe and state that net earnings of said Northern division of the Cumberland and Ohio Railroad Company came into the treasury of said lessee which has never been applied to the payment of the unpaid and accrued interest aforesaid.

Plaintiffs further state that afterward, to wit, on the — day of ——, 18—, Joshua F. Speed died, and Shelby circuit court, upon application which was made to it by the holders of the aforesaid bonds to the amount of more than $70,000 to appoint a trustee in lieu of said Speed in the mortgages and contracts aforesaid, *the said Shelby circuit court*, by order duly entered, duly appointed plaintiff, Adolph Schmidt, such trustee, to succeed to and be vested with all the rights, powers, and privileges which were by the said deeds of mortgage and other contracts conferred upon the said Speed or intended so to be.

Plaintiffs further state that all the sources of the said Northern division of the Cumberland & Ohio Railroad Company of raising money fail- to provide for said interest and sinking fund provided for in the mortgage aforesaid and failed to provide any part of said interest or sinking fund payments, and that it became and is necessary that the amounts thereof should be provided and supplied by appropriating the net earnings of the said Louisville, Cincinnati &
354 Lexington railway and properties accruing to said railroad and properties by reason of business coming to it from or over the said lines of the Northern division of the Cumberland & Ohio Railroad Company.

Plaintiffs further state that after the execution of said lease and

the execution of the mortgage aforesaid made by said lessee of the net earnings aforesaid which it might make on business coming to it from and over the Northern division of the Cumberland & Ohio railroad, more fully stated in the petition now amended, the Louisville & Nashville Railroad Company, which at all the times mentioned had notice of the said mortgage and actual knowledge of its contents, on or about the 1st day of November, 1881, by a certain deed bearing said date and recorded in the office of the clerk of the county court of Jefferson county, State of Kentucky, in Deed Book 245, page 1, purchased and received and accepted a conveyance from said Louisville, Cincinnati & Lexington Railway Company of the railroad of the said grantor, extending from the city of Louisville, in the State of Kentucky, to the city of Lexington, in said State, and from the junction with said railroad at Lagrange, a point about 27 miles from Louisville aforesaid, to the city of Newport, in said State, together with all depots, real estate, rolling stock, and other property of said grantor, and the franchises of said grantor to operate the said railroad and take the tolls and earnings thereof.

Plaintiffs state that in and by said deed of conveyance said grantor assigned and transferred to said grantee, the Louisville &
355 Nashville Railroad Company, the aforesaid lease made as aforesaid to said grantor by said Northern division of the Cumberland and Ohio Railroad Company on the 28th day of July, 1879, together with all the obligations thereof, and said Louisville & Nashville Railroad Company accepted the said assignment and transfer of said lease, and therein and thereby assumed to perform the obligations thereof.

Plaintiffs state that prior thereto the said Louisville & Nashville Railroad Company had purchased and acquired and at the time of said conveyance held the capital stock of the said Louisville, Cincinnati & Lexington Railway Company, and as such stockholder took and appropriated and has ever since enjoyed the whole purchase price of the Louisville, Cincinnati & Lexington Railway Company and all its said properties.

Plaintiffs state that after the execution of said deed of November 1st, 1881, said Louisville & Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati & Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern division of the Cumberland & Ohio Railroad Company aforesaid, and began to operate and has ever since operated said railroads and properties and taken and appropriated to its own use the earnings thereof.

Plaintiffs state that at all times since November 1st, 1881, said Louisville & Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by
356 virtue thereof, has operated the said Northern division of the Cumberland & Ohio railroad and the said Louisville, Cincinnati & Lexington railway and properties, and has made all the earnings mentioned and proved in the reports of the several commissioners in this case, and ascertained and adjudged in the several judgments of this court, and finally adjudged in the opinion and

judgment of the court of appeals herein, all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati & Lexington Railway Company.

Plaintiffs further state that the Louisville & Nashville Railroad Company at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati & Lexington Railroad Company actually knew all the provisions of the lease, mortgages, and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties therein referred to, in accordance with said lease, mortgages, and contracts, from the time of its said purchase until the 1st day of April, 1883, and knew at all said times, including the time during which this action has been pending, that it had operated said railroad and all the other property of said Louisville, Cincinnati & Lexington Railway Company and of the Northern division of the Cumberland & Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation
357 of the railroad and properties of the Louisville, Cincinnati & Lexington Railway Company and the Northern division of the Cumberland & Ohio Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati & Lexington Railway Company, and filed all other papers which were filed herein on behalf of the defense, and itself employed counsel in this case to make defense in the name of the Louisville, Cincinnati & Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defense of this action, and has been in court defending this action and has controlled the defense thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the — day of ——, 1885, and from the time the said Louisville & Nashville Railroad Company caused the answer to said petition to be filed herein on the — day of ——, 1886.

Plaintiffs state that they did not know and were not informed until the response was filed herein on the 25th day of June, 1894, of the control which the said Louisville & Nashville Railroad Company had of the property of the said Louisville, Cincinnati & Lexington Railway Company and the Northern division of the Cumberland and Ohio Railroad Company.

Plaintiffs further state that it was the intention of the plaintiffs to sue the company or companies controlling and operating the railroads and properties of the Louisville, Cincinnati & Lexington Railway Company and Northern division of the Cumberland
358 & Ohio Railroad Company, and which made the earnings aforesaid, exhibited as aforesaid in defense of this action.

And plaintiffs now amend their petition and make the Louisville & Nashville Railroad Company a defendant hereto, and pray judgment against it for the subjection of the aforesaid earnings made on the railroad of the Louisville, Cincinnati & Lexington Railway

Company aforesaid from the 1st day of June, 1883, until the — day of ——, 1890, until all the bonds and coupons mentioned in the petition and this amended petition shall have been fully paid and satisfied, even unto the termination of the lease made, as aforesaid, by the Northern division of the Cumberland and Ohio Railroad Company to the Louisville, Cincinnati & Lexington Railway Company; and inasmuch as the said Louisville & Nashville Railroad Company has in the name of the Louisville, Cincinnati & Lexington Railway Company made defense to plaintiffs' petition in this case and to the other proceedings taken by plaintiffs herein, and after having been defeated in its contention, and after solemn judgment has been rendered against it on its appeal to the court of appeals of Kentucky, has undertaken to thwart said judgment by filing a response herein on the 25th day of June, 1894, in the name of the said Louisville, Cincinnati & Lexington Railway Company, stating that said company had no property and could not comply with the judgment of the court, and inasmuch as the Louisville & Nashville Railroad Company has shown its determination in every way to thwart the collection of said judgment, and still fails and refuses to pay said judgment or any part thereof, although still retaining
359 all said properties of the Louisville, Cincinnati & Lexington Railway Company and Northern division of the Cumberland & Ohio Railroad Company, appropriating and enjoying the rents and profits thereof and the earnings to which plaintiffs have been adjudged entitled, as aforesaid, plaintiffs pray that this honorable court will appoint a receiver of the railroad and all the properties of the said Louisville, Cincinnati & Lexington Railway Company which were transferred and possession of which was turned over to said Louisville & Nashville Railroad Company, as aforesaid, to operate the said railroad and properties and collect the said earnings thereof and apply the said earnings according to the judgment of the court of appeals aforesaid, and pray judgment for their costs herein incurred and all other proper, general, and equitable relief.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Pl'ffs.

Plaintiff Adolph L. Schmidt, as trustee, says that the statements contained in the foregoing amended petition are true as he verily believes.

ADOLPH L. SCHMIDT, *Trustee.*

Subscribed and sworn to before me by Adolph L. Schmidt, as trustee, this 25th day of May, 1895. My commission as notary public expires June 15th, 1897.

HERBERT BOONE,
Notary Public, Jefferson Co., Ky.

And the defendants objected to said motions, and, said motions coming on to be heard, the court overruled said motions and
360 refused to allow said reply to be withdrawn or said amended petition to be filed; to which action of the court the plaintiffs then excepted and obtained leave to file this bill of exceptions,

which is now examined, approved, signed, sealed, and enrolled and ordered to be made part of this record without being spread at large on the order book, which is accordingly done.

STERLING B. TONEY, *Judge.*

And on the 10th day of July, 1895, the plaintiff- filed a schedule in the office of the clerk of the aforesaid court, which is as follows, to wit:

Jefferson Circuit Court, Law & Equity Division.

ADOLPH L. SCHMIDT, &c., Pl'ffs,
vs.
LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY Company, &c., Def'ts. } Schedule.

The clerk will copy for use on the appeal herein to the court of appeals the entire record in this case except that part which precedes the orders made herein on May 28th, 1894. The record prior to May 28th, 1894, in this court was used in a former appeal of this case and is now on file in the office of the clerk of the court of appeals, and the transcript now ordered is intended to supplement said former transcript and bring same down to this date.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Pl'ffs.

361 STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court, do hereby certify that the foregoing 37 pages, this included, contain a full, true, and complete transcript since and including the 28th day of May, 1894, in the case wherein Adolph L. Schmidt, &c., are plaintiffs and Louisville, Cincinnati & Lexington Railway Company are defendants, # 1860, as the same appears of record and on file in my said office.

Witness my hand this 2nd day of August, 1895.

JOHN S. CAIN,
Cl'k Jeff. Cir. Ct.

With the foregoing transcript the following statement of parties, &c., was filed:

Court of Appeals of Kentucky.

ADOLPH L. SCHMIDT, Individually and as Trustee for Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company; Jacob Peter, James McCarty, George H. Breed, P. Booker Reed, Eliza Reed, W. C. Reamer, and Others, for Themselves and Other Owners of said Bonds, Appellants,

vs.

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Company and Louisville & Nashville Railroad Co., &c., Appellees.

} Statement.

The judgment and order appealed from herein was rendered by the Jefferson circuit court, law and equity division, on May
362 31st, 1895, and may be found on pages 16 and 17 of the record with which this statement is filed.

No summons or warning order need be issued against the Louisville, Cincinnati & Lexington Railway Company. The clerk will grant an appeal against the Louisville & Nashville Railroad Company and issue summons at once to Jefferson county against said Louisville & Nashville Railroad Company.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Appellants.

The following is the summons and return of sheriff therein directed to be issued by the foregoing statement:

COMMONWEALTH OF KENTUCKY:

To the sheriff of Jefferson county, Greeting:

We command you to summon Louisville and Nashville Railroad Co. to appear before the judges of the court of appeals of Kentucky, at the capitol, in Frankfort, on the first day of their next September term, to show cause, if any it can, why a judgment obtained by it, &c., in the law and equity division of the Jefferson circuit court against Adolph L. Schmidt and others on May 31st, 1895, should not be reversed for the errors therein contained, as we from their complaint are informed, and have then there this writ.

Witness A. Addams, clerk of our said court, at the capitol aforesaid, this 22 day of August, 1895.

A. ADDAMS, *C. C. A.*
—— ——, *D. C.*

363 Came to hand Aug. 23, 1895, at 11.20 a. m.

Executed August 23, 1895, on Louisville and Nashville Railroad Company by delivering a copy of the within summons to Stuart R. Knott, vice-president of said company, he being chief officer found in this county at this time.

JNO. R. PFLANZ, *S. J. C.*,
By W. J. DALTON, *D. S.*

Fee, 60c.

Afterwards, on the 26th day of November, 1895, at a court of appeals held as aforesaid, the following order was entered herein:

SCHMIDT, &c.,
v.
LOU., CIN. & LEX. R'Y CO., &c. } Jeff.

The appellant, by counsel, filed an affidavit and moved the court to advance this cause and set the same for oral argument.

The following is a copy of the affidavit filed by foregoing order:

Kentucky Court of Appeals.

A. L. SCHMIDT, Trustee, &c., Appellant,
to
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY and Others, Appellees. } Affidavit.

The affiant, A. L. Schmidt, trustee, says that the Louisville
364 & Nashville Railroad Company, by M. H. Smith, its president, has given notice to the Northern division of the Cumberland and Ohio Railroad Company that on and after the 31st of December, 1895, the said Louisville and Nashville Railroad Company will cease to operate the line of road owned by said Cumberland & Ohio Railroad Company from Bloomfield to Shelbyville. Affiant further says that the said Louisville & Nashville Railroad Company has foreclosed a second mortgage on the said Cumberland & Ohio railroad in the Shelby circuit court, subject to the first mortgage, and the said property has already once been advertised for sale and is liable to be advertised for sale again at any time, and it is of great importance that the rights of parties in this appeal should be ascertained as soon as possible, so that they may properly protect their rights and interests in said Cumberland & Ohio railroad under the lease and mortgage referred to herein.

A. L. SCHMIDT, *Trustee.*

Subscribed and sworn to by A. L. Schmidt, trustee, this 25th day of December, 1895.

My commission expires May 20th, 1896.

JOHN C. DOOLAN,
N. P., J. Co., Ky.

Afterwards, on November 27th, 1895, the following order was entered:

The court being advised, the motion to advance this cause
365 is sustained, and the cause is advanced and ordered to be set for hearing at an early day as practicable during the January term.

Afterwards, on January 29, 1896, the following order was entered herein:

The cause, coming on to be heard, was argued by James P. Helm,

for appellee, and E. F. Trabue and J. G. Simrall, for appellant, and submitted.

Afterwards, on April 4, 1896, the following judgment was entered:

A. L. SCHMIDT, &c., Appellants,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., Appellees.

Chief Justice Pryor and Judges Lewis, Hazelrigg, Paynter, Guffy, & Du Relle sitting.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court. It is further considered that the appellees recover of appellants their cost expended herein.

Afterwards, on May 5, 1896, the following order was entered herein:

Came appellee, by counsel, and filed a petition for modifi-
366 cation of the opinion herein, but the court, not being sufficiently advised, took time.

The following is a copy of the petition filed by the foregoing order:

Court of Appeals of Kentucky.

A. L. SCHMIDT, Trustee, Appellant,
versus
LOUISVILLE, CINCINNATI & LEXINGTON Railway Company, Appellee.
Petition for Modification.

We ask the court to modify its opinion herein by striking therefrom what we conceive to be extrajudicial, or what may be called the advisory part thereof.

The court did not have before it all the facts upon which it could safely found advice, and, even if it were otherwise, we submit with deference that the court ought not in advance to commit itself to decide a question in a particular way when it shall be raised and presented in the manner advised by the court.

We are entirely sure that this court would not willingly be unjust to any litigant, but we submit that the only safe way to avoid injustice is to decide only such questions as are involved, and are therefore presented for decision, for it is only with reference to such questions that a case is prepared.

In requesting the modification suggested we feel that we
367 are doing no more than asking the court, in the interest of justice and fair play, to withhold its decision and suspend its judgment upon an important question until it is properly involved in the litigation and presented for the decision of this court, for not until then will the parties be required or will it be proper for them

to present their respective sides of the controversy, and not until then will they have their day in court.

In the discussion which ensues we feel that we are debating a moot question, in the hope that we may remove from the court's mind what we believe to be an erroneous impression prematurely formed.

In 1879 the Louisville, Cincinnati & Lexington Railway Company leased from the Northern division of the Cumberland & Ohio Railroad Company its unfinished line from Bloomfield to Shelbyville. One of the provisions of the lease was that the lessee would, in a certain event (which might or might not happen), pledge temporarily its net earnings (which might or might not be made) for the use of the lessor, to the payment of interest on the mortgage bonds issued by the lessor. Another provision was that the lease should not be assigned without the consent of the lessor.

In 1881 the lessee sold its property and franchises, except the franchise to exist, to the Louisville & Nashville Railroad Company. The franchise to exist was not sold, and the organization has been kept up.

368 In the deed from the Louisville, Cincinnati & Lexington Railway Company to the Louisville & Nashville Railroad Company there were words of assignment of the lease. Soon thereafter the lessor was asked to consent to the assignment of the lease, but withheld its assent. The Louisville & Nashville Railroad Company, however, operated the road thereafter.

In 1885 the appellant Schmidt, as trustee for the bondholders, instituted the present action against the Louisville, Cincinnati & Lexington Railway Company on the contract made by *it*, and sought to fix a liability on *that company* growing out of *that contract*.

What the theory of the plaintiff was at that time we cannot certainly say. We have always, however, supposed that the plaintiff desired to fix a liability on the Louisville, Cincinnati & Lexington Railway Company, the party to the contract, and then attempt to follow the property into the hands of the Louisville & Nashville Railroad Company by asserting and endeavoring to maintain a lien upon the property. The liability of the Louisville, Cincinnati & Lexington Railway Company was supposed to continue, because the lessor had withheld its consent to the assignment of the lease.

We have, since the decision, re-read the brief of attorneys for appellant, and feel sure that our suggestion of appellant's theory, viz., to proceed to judgment against the Louisville, Cincinnati & Lexington Railway Company, and then assert a lien on the property in the hands of the Louisville & Nashville Railroad Company, is abundantly sustained by their brief. Thus, on page 14, it is said:

369 "The contention that this case is distinguishable from the Heckman case, because the action here is *ex contractu*, has no force, because this proceeding is *in rem and not in personam*.

"For the sake of this argument it may be conceded that if the

name of the Louisville, Cincinnati & Lexington Railway Company was stricken from the caption of the original petition, and that of the Louisville & Nashville Railroad Company inserted instead, the petition would be demurrable because nothing would appear connecting the latter with the cause of action, but the averments of such necessary facts now appear in the amended petition, which the circuit court refused to permit to be filed."

Think, for a moment, what this means. If the Louisville & Nashville had been named a party defendant the petition would not have supported a judgment against it. The court would, therefore, have been bound to have given judgment in its favor. If this had been done is it not perfectly obvious that the plaintiff would not be allowed to amend the petition a year after the entry of the final judgment? Is the plaintiff better off by reason of its failure to name the Louisville & Nashville as a party?

We are not sure we understand the succeeding paragraph of the brief, but it is as follows:

"Were this an action strictly *in personam* the judgment against the Louisville, Cincinnati & Lexington Railway Com-
370 pany might be inapplicable to the Louisville & Nashville Railroad Company for want of any connection between that company and the subject-matter of the judgment, so that that company's defence of the action would inure to bind it simply by the matter of the judgment which could not concern it."

Again on page 16 it is said:

"It further results that, inasmuch as the plaintiffs had no contract with the Louisville & Nashville Railroad Company, it could have no judgment *in limine* against that company *in personam* because its contract, which would be the basis of a personal judgment, was with another company, viz., the Louisville, Cincinnati & Lexington Railway Company, and not the Louisville & Nashville Railroad Company, as was pointed out by the circuit court below.

"But it also follows that as the plaintiffs, by the contract with the Louisville, Cincinnati & Lexington Railway Company, acquired a lien upon the earnings of its property by a mortgage of record, and of the terms of which the Louisville & Nashville Railroad Company had actual knowledge, and subject to which it purchased the property, this lien continues on the earnings in the hands of the Louisville & Nashville Railroad Company, as did a similar lien on the income of the Union Pacific Railroad Company."

Whether a pledge of net profits which might or might not be made has the effect of creating a lien upon the property
371 of the Louisville & Nashville Railroad Company is a question, the affirmative of which is simply assumed by the appellant, who treats the matter as if there were no distinction between pledging net profits which might or might not be and pledging the income from property in constant operation. It would be premature to discuss this question now, but we submit that the extracts from the brief which we have made are certainly sufficient to show that appellant never considered that the Louisville & Nashville Railroad Company was a party, and did not seek to obtain relief

against that company in this case. It is, we submit, a sufficient response to their statement that this is a proceeding *in rem* to enforce their lien, to point out that when it came time to enter the judgment counsel did not deem that the pleadings authorized anything but a judgment *in personam*, which counsel expressly admit cannot properly be entered against the Louisville & Nashville Railroad Company. If, then, we treat the case as an action *in personam*, and nothing else can be made of it, and counsel never, during the pendency of the case up to this time, have indicated that they thought anything else could be made of it, we certainly have the direct confession of counsel that the Louisville & Nashville Railroad Company was not concerned with the suit. But, whether we are right or wrong as to the theory of appellant, it is certainly true that the only defendant *named* was The Louisville, Cincinnati & Lexington Railway Company, and there was not a single averment made against the Louisville & Nashville Railroad Company,
372 nor could any of those actually made have been truthfully made against the Louisville & Nashville Railroad Company. If the name of the Louisville, Cincinnati & Lexington Railway Company had been stricken from the caption and that of the Louisville & Nashville Railroad Company inserted, the exhibits filed, and upon which the action is based, would have shown the untruthfulness of every averment made, and the petition would obviously have been demurrable.

But the record will be examined in vain to find the slightest evidence that plaintiff ever, for a moment, suspected that the Louisville & Nashville Railroad Company was a party to that suit, and the plaintiff's last step shows conclusively that he proceeded upon precisely the opposite theory, for his last step was to offer an amended petition making the Louisville & Nashville Railroad Company a party, seeking thereby, after judgment, to make allegations against it, which, he says, are necessary to state a cause of action against it, but which were never alleged before. This motion was overruled, and the only error complained of was the refusal of the lower court to allow to be filed the amended petition making the Louisville & Nashville Railroad Company a party. Upon these facts we submit to the candid consideration of the court whether it was not in error when it stated that one of the questions involved was "whether, upon the facts alleged in the amended petition (which the lower court refused to allow to be filed, and which judgment this court affirmed) and disclosed by the
373 record, the Louisville & Nashville Railroad Company is bound, by the judgment herein, to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Company out of the business coming to it from or over the Cumberland & Ohio." How could that question be involved in an appeal from an order refusing to allow the Louisville & Nashville railroad to be made a party? By the very order, appealed from and affirmed by this court, the lower court refused to allow that question to be litigated in this case.

We submit that this court in the same opinion confesses the error

of its statement of the questions involved in the following words: "This question, while not strictly before the court upon this appeal, has been considered and decided to the end of preventing needless litigation." No question can be "decided" unless it is *involved*, and we insist that the court does a great wrong to a litigant when, in advance of the question being presented for decision and when the court does not know the facts of the whole controversy, it declares that any litigation on that subject will be needless.

It is only because of the use of such language and what the court has said on a question admitted by it to be *not* before it on this appeal that we enter upon a review of the authorities cited by the court in the hope, as we have said, of removing what we deem to be an erroneous impression from the court's mind.

But before we do so we desire to call the court's attention
374 to the fact that it is, we submit, in error in acting upon the assumption that it is bound to treat *as true* all the allegations of the amended petition. Such would have been the case if it had been offered in time and the objection to the filing had been on the ground of its *insufficiency;* but it is not true here, because the amendment came too late, and the motion to file was overruled because there was nothing to amend; the case was concluded, the book was closed and sealed by the entry of the final judgment except for the purpose of enforcing that judgment against the defendant upon whom it rested, and it may be the case could have been retained for the further purpose of making investigation into the question as to whether any other earnings since the date of the last report had been made by the defendant to that suit; but, so far as the cause of action set up in the petition as amended is concerned, we submit that it is perfectly evident that the record was concluded and at an end except for the purpose stated (Brown *v.* Vancleave, 86 Ky., 331; Meadows *v.* Goff, 90 Ky., 541).

This court, however, if we understand the opinion, places its affirmance on the ground that the Louisville & Nashville Railroad Company was already a party, and suggests that appellant might proceed against the Louisville & Nashville Railroad Company by a rule based upon affidavit stating the fact set out in the amendment. How the court expects the litigation to be conducted from that time on we are not advised, unless it expects issue to be made by affi-
davits instead of pleadings. In such an event it seems to us
375 that the suggestion of the court is wholly without precedent.

The court cites a great many authorities in support of its proposition that the Louisville & Nashville Railroad Company is already a party to this suit. We have carefully considered all of them and submit with deference that while — a number of them, under the peculiar circumstances set out in the several opinions and hereafter to be adverted to, it was held that one not a nominal party might be bound by a judgment rendered against another who was the nominal party, yet in not *a single one of them* was it held that the third party was *a party to the original litigation.* In *every instance* the question arose in a *subsequent suit* instituted against the *third party,* who was said to have defended the original suit

against the nominal party. In the last case referred to, to wit, Wiggins Ferry Co. *v.* O. & M. R'y, 142 U. S., 415, there was no attemp to bring in a new party or to hold one not a party to the record liable; but the court simply allowed, in furtherance of justice, an amended petition to be filed, stating that it should not be allowed to introduce a new cause of action, but might set up a new measure of damages. This case, we submit, cannot be considered authority for the proposition which we understand it to be cited to support.

The remaining cases cited by the court may be divided into several classes:

1. Those in which there were misnomers, the real party being by mistake sued by the wrong name. Into this class most
376 distinctly falls the cases of Heckman *v.* The L. & N. R. Co., 85 Ky., 638; L. & N. R. Co. *v.* Hall, 12 Bush, 131.

2. Those in which the agent of the real party was sued and the real party defended the suit in the name of the agent. Into this class falls the case of Eagle, &c., Co. *v.* Bradley, &c., Co., 50 Fed. Rep., 193; and this is more distinctly shown where the same case was affirmed by the seventh circuit and reported in 57 Fed. Rep., 981. In the same class fall the cases of Wood *v.* Ensel, 63 Mo., 193; Palmer *v.* Hays, 112 Ind., 292; Warfield *v.* Davis, 14 B. Mon., 41; Claflin *v.* Fletcher, 7 Fed. Rep., 851.

3. Those in which a third party was held liable not to the plaintiff in the original suit, but to the defendant against whom judgment had gone in the original suit, notice having by the defendant been given to the third party of the pendency of the suit. These cases proceed upon the principle that the third party was liable to the defendant—something like a warrantor is liable to his grantee and must defend his title when it is brought in question and he is notified of the fact. Into this class fall the cases of Linton *v.* Harris, 78 Ga., 265; Davenport *v.* Muir, 3 J. J. Marshall, 310; Robbins *v.* City of Chicago, 4 Wall., 657; Boston *v.* Worthington, 10 Gray, 496, and Milford *v.* Hollrood, 9 Allen, 17.

4. Where a third party caused a city to condemn as the property of another a strip for his, the third party's, benefit and executed to the city a bond of indemnity to secure the city against all costs of the proceeding. The judgment in the condemnation proceeding was for so large an amount that the city aban-
377 doned the proceeding. Thereafter the third party, at whose instance the condemnation proceeding had been instituted, questioned the title of the defendant to the original suit to the strip sought to be condemned. The court held that inasmuch as the suit was brought for his benefit under the agreement mentioned that he would be estopped to question the title of the defendant. This, however, was, like all the others, decided in a separate suit (Landes *v.* Hamilton, 77 Mo., 554).

5. Where A owes money either to B or C, and, being sued by B, notified C, who comes in and litigates with B, and, of course, is concluded by the result. Into this class fall the cases of Estel *v.* Peacock, 46 Mich., 471, and Stodard *v.* Thompson, 31 Iowa, 80. In

reference to the first of these cases this court remarks that the third party was held concluded by the judgment. The fact is, the third party, who conducted the defense for the nominal party, won the suit, and neither party thereafter called in question the judgment.

6. Where the defendant had purchased a house after a mechanic's lien had been filed and suit brought to have that lien declared a first lien, the court declared the lien to be a first lien. This judgment was assigned to the plaintiff in the present suit, who brought an action on it against the owner of the house. The court held that the judgment establishing the lien was conclusive on the defendant (Wilmington *v.* Star Mining Co., 18 Ill. App., 17).

7. Suit in ejectment brought against a tenant. Landlord
378 notified by the tenant, and comes into the case and puts his title in issue and manages the defense throughout. It is held in a subsequent suit that he was bound by that judgment. This principle is surely not a new one. The reason for the opinion, and which clearly distinguish such a case from the case at bar, are very clearly given in the opinion. Into this class falls the case of Valentine *v.* Mahoney, 37 Cal., 391.

8. When one insurance company reinsures the risk of another company, which latter company, being sued for a loss, turns over the defence to the reinsuring company, which would, of course, be liable to the other company in a subsequent suit, this reinsuring company is held concluded by the judgment. Such a case as this is easily distinguishable from the case at bar. Into this class falls the case of Strong *v.* The Phœnix Ins. Co., 62 Mo., 289.

9. Where a sheriff has levied improperly upon the goods of another, being so informed by the claim of that other, — requires and receives from the plaintiff in the execution an indemnifying bond, after which he sells the goods, it was held that the plaintiff and the sheriff became joint trespassers. The sheriff was sued and notified the plaintiff in the execution, who came in and defended the suit. Subsequently a suit was brought against the plaintiff as a joint trespasser, and the court held that he was bound as such, and not only so, but, as he had defended the suit brought against the sheriff, he was concluded by the findings of the court in that case,
379 being practically a party. Into this class falls Lovejoy *v.* Murphy, 3 Wall., 1. They therefore allowed the record of the old case to be introduced in evidence.

The case of Cole *v.* Favorite, 69 Ill., 457, cited by the court, we do not think is at all in point. Cole stored with Favorite a number of barrels with the agreement that Favorite should keep the same insured. Favorite did keep same insured, but Cole, wishing to borrow money on warehouse receipts, had Favorite, after the insurance had been taken out, to issue to him (Cole) a receipt, the effect of which was that Favorite agreed to keep so many barrels insured up to September 15, 1865. After that date, and while the barrels were still in the warehouse and still insured, they were burned. Cole and Favorite agreed to enter suit against the insurance company for the value of the barrels and other articles burned, and to share equally the costs of the suit, but suit to be in the name of Favorite.

The insurance company defended upon the ground that the barrels covered by the receipt were not insured, and it exhibited this receipt, and the court sustained that defense. Subsequently Cole brought suit against Favorite, alleging that he had not kept the goods insured according to his agreement. Favorite defended upon the ground that the company had been enabled to defeat the policy by the act of Cole in obtaining the receipt above referred to. Here it will be seen that Cole proceeded upon the theory that the goods had not been insured, and did not question the decision in the old case nor ask to have any part of it relitigated, and that the de-
380 fendant Favorite did not ask to have the proceedings in the old case reviewed, but defended solely upon the ground that Cole's action in taking that receipt caused the loss of the case. The court, however, does discuss the question as to whether or not they were concluded by the old case, though that question was not involved, and the discussion of the court was obviously illogical and out of place, as neither party sought to question the judgment referred to.

In the case of State *v.* Johnson, 25 S. W. Rep. (Mo.), 855, a mandamus proceeding was brought to require the auditor and comptroller to issue warrant for Kane's salary as chief of the fire department. The defense was that prior to this suit one Ransom, a tax-payer, on behalf of himself and others, brought suit against the defendants to restrain them from issuing warrants to the plaintiff. It appeared that when this first suit was brought Kane applied to the defendant to be allowed to employ counsel and defend the case, which was granted him, and he had the entire defense of that suit. The court, however, held that he was not a party to the record and could not appeal from that decision, and consequently was not estopped by that suit, and that so far as Kane was concerned it was not *res adjudicata* (citing Hope *v.* Mayor, 72 Ga., 246, and 40th Conn., 298).

In the case of Moseley *v.* Cocke, 7 Leigh (Va.), 224, the petition was filed against various parties seeking to set aside a certain conveyance as fraudulent. William Moseley was purchaser of
381 part of the land conveyed by William Bentley, the elder, to his children, the conveyance of which it was the object of the bill to set aside. But he was not made a party defendant by the bill, nor was there any allegation in it against him nor any relief prayed against him, yet a subpœna was sued out and served upon Moseley to answer the bill, and he not appearing, it was followed by a decree *nisi*, which was also served upon him, and afterwards the bill was taken *pro confesso* against Moseley. Afterward, on judgment against the other defendants, the case was appealed and affirmed, and then, on attempted proceedings on the judgment against Moseley, he came in and offered to file an answer. The court refused to allow him to answer, saying:

"No person has a right to file an answer in any suit in which he was not a party. The question, then, is, was Moseley a party here or not? It cannot be fairly questioned that the subpœna and conditional decree were both served upon him, but he is not named in the bill. There is no allegation anywhere in it which bears upon

or in any manner refers to him, nor is any decree prayed against him either in terms or in the usual language praying a decree 'against all persons unknown and may be hereafter discovered claiming under or combining with the defendant.' It is a distinct charge against them for certain lands. Moseley therefore seems to me not to be a defendant in any fair sense of the word. No process is prayed against him by the bill, and therefore, according to the authorities, he was not a defendant; and, there being no charge
382 against him and no decree prayed, he had nothing to defend. * * * In short, a decree against one not named in the bill and nowise comprehended in its general allegations is a nullity."

This court quotes with approval the following part from one of the opinions cited:

"Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person fall within this category (meaning that they are bound by the judgment), and in such cases parol evidence is admissible to show who are the real parties in interest, and that they conducted the litigation in the name of other parties."

Without at this time quoting the reasoning of this case and other of similar import cited by the court, it seems to us that the reasoning of this court upon that identical question in the case of Allin's Heirs *v.* Hall's Heirs, 1 Marshall, 525, is immeasurably superior to the reasoning of the court in the other cases outside of Kentucky, and it has never been overruled or doubted by this court that we can find. We respectfully submit, therefore, that it ought not to be ignored by this court in its discussion upon a point admitted by it not to be involved in this litigation.

In the Allin case, *supra*, there was a conflict in certain land patents. Mallory took out a patent for 2,000 acres, and afterward conveyed it to Craig, and Craig conveyed it to Hall's heirs, who respectively took possession of and settled upon their several portions.
383 This patent was taken out on the 12th of May, 1780. On the 1st of April, 1785, two patents were obtained by William McCracken, one for a settlement of 400 acres, the other for a preemption of 1,000 acres covering the greater part of the land embraced in Mallory's patent. Richardson Allin and his wife (the latter being the daughter of William McCracken, who has died) instituted actions of ejectment in the Franklin circuit court and obtained judgment thereon against the heirs of Hall. Lewis Craig, the vendor of the Hall heirs, exhibited his bill on the chancery side of that court, alleging Mallory's entry and patent and his purchase from Mallory, his sale to Hall's heirs, and the judgments of eviction in the ejectments against them. He insisted that Mallory's entry was a good and valid one and his patent thereon legally obtained, and that the claim of Allin and wife was vague and void. He prayed and obtained from the court an injunction against the judgments in the ejectments suits. Allin and wife answered the bill of Craig; relied upon the validity of their claim as derived from their ancestor, McCracken; urged, in addition to the validity of their entries, the seniority of their patents. Craig's bill upon a final hear-

ing was dismissed with costs. The appellees afterward filed their bill on the chancery side of the same court against John Allin, to whom Richardson Allin and wife had conveyed pending the other suit. They set out Mallory's entry, patent, sale, and conveyance to Craig and the conveyance by Craig to them respectively; insisted upon the specialty, validity, and legality of their claim, and
384 urged that the claim of Allin is vague and void. They recited the ejectment aforesaid and the obtention of judgments therein by Richardson Allin and wife against them, and prayed and obtained an injunction against the said judgments. John Allin answered their bill, denied the validity of Mallory's entry, insisted upon his senior patent, and urged in bar of their right to sue the suit of Craig *v.* Allin and Wife and the decree therein. That suit, he insisted, was instituted at their instance with their assent and approbation, involved the same matter, was conducted at their expense, managed according to their will, sustained by their personal efforts, and intended for their benefit. He urged that although Craig was the nominal, they were the real complainants therein; that some of them were the securities of Craig in the injunction bond, and that they all retained the possession of their lands by reason of the suit during the pendency thereof. As further evincive that the appellees were virtually parties to the suit, he alleged that they or most of them had, previous to the institution of that suit of Craig, respectively released errors in the ejectment suits as a prerequisite to the obtention of the injunction prayed for therein. John Allin, after he had answered, died, and the suit was revived in the names of his heirs, and upon the trial and final hearing thereof a decree was pronounced in favor of Hall's heirs, from which an appeal was prayed and granted. The court thus states the question involved:

385 "The question first presented for the consideration of this court is the competency of the matter alleged in the answer to bar the suit of the appellees.

"There is no doubt but that the parties to a suit, either at law or in chancery, are bound by the judgment or decree pronounced therein, and are bound thereby (while it remains unreversed) from rediscussing in another suit the matters thereof, and that their privies are alike bound and barred. This principle is so intrinsically just and so obviously necessary that it has obtained the place and character of a rule of law with all the commentators upon and compilers of our laws. The decree in the case of Craig *v.* Allin and Wife purports to embrace the same matter embraced by the bill of the appellees, to have been upon the merits, and as it was final and remains unreversed, they, if they can be considered as parties thereto, must, according to the rule aforesaid, be barred or bound thereby.

"To ascertain the extent of the effect of a judgment or decree in relation either to the matters thereof or parties thereto, the record of the suit in which it may have been rendered or pronounced should be explored. If affords the information most, if not solely, to be relied upon in the progress of such an inquiry. The law imputes to the record absolute verity, and will not permit the matter

which it imports to be gainsa*yed* or traversed. A record is defined to be the history of a suit from its commencement to its conclusion, inclusive, and in every stage of its progress the forms and devices of the law are admirably adapted to the superinduction of the
386 verity which it ascribes to the record thereof in relation either to the parties thereto or the matter therein. To each party there is afforded the most ample and appropriate means of extracting from the suit all the doubt and uncertainty which may exist therein in relation to the personal competency of his adversary or to the matters alleged by him.

"And hence results (as we believe) the rule that none are to be considered as parties to a suit and bound in that character by a judgment or decree therein but those who are named as such in the record thereof. The appellees are not named in the record of the suit of Craig against Allin and wife as parties thereto, and of course, according to the rule of law last mentioned, cannot in that character be bound or barred by the decree pronounced therein. Not being barred as parties to that suit, it remains to be inquired whether they are barred as privies. The most general division of privies is into those of contract, of estate, and of blood. Privity of blood is not alleged in this case. That of estate cannot be relied upon, because Craig, at the time of the institution of the suit aforesaid, had no estate, interest, title, or claim in or to the land in controversy, either in law or equity. That of contract did not exist, for anterior to that time they had consummated their purchases and had in themselves the legal as well as equitable title to the land. As privies, therefore, we cannot think they are bound or barred by the decree.

"But it is alleged that they had an interest and took an
387 agency in that suit which ought to subject them to the decree therein as virtual, as much as if they had been express parties thereto. Any zeal which third persons may display in favor of a party to a suit, or any assistance they may afford him, either in money or services, may subject them to the animadversion of the law as barrators or maintainors, or entitle them to the kind regard of the good and virtuous, as a spirit of unjust and oppressive litigation or the just claims of virtue and indigence shall have been subserved or promoted thereby.

"But it will be a dangerous doctrine to say that those circumstances or any of the other acts which are alleged to have been done by the appellee in relation to that suit should subject them to the decree therein as virtual parties thereto. It would be substituting vague conjecture, or at best the erring discretion of the judge, for that record certainty which it is believed the law affords in that class of cases. Upon the criterion afforded by the law we can know certainly, by an inspection of the record, who were parties to the suit, and we can know certainly the extent to which their interests have been settled by a judgment or decree therein, and we can know as certainly that none other than they and their privies are bound thereby; but if we can depart from the record and ascertain by proof *aliunde* who were parties to a suit, other than those named as such therein, may we not, with the same reason, ascertain by

parol what other subjects than those specified in the bill or declaration were involved in the suit and settled by the decree or
388 judgment, and *e converso* may we not ascertain by parol that a person expressly named in the record of a suit as a party thereto was only nominally and not really so, and that some of the allegations in a declaration or bill were not considered or regarded by the jury or the chancellor, and that others were only partially considered, and are therefore legitimate subjects for future adjudication? If such a theory were adopted might not justice be denied to some citizens, in violation of their constitutional right thereto, on the ground that they had been virtually parties to a suit, in the record of which they had not so appeared or been named, and might not other citizens, on the same theory, be vexed and harassed, and have those rights which had been settled by adjudication jeopardized by rediscussion in successive suits? In fine, might not the peace of the citizens and their dearest rights upon such a theory be subjected to the frailty of human memory, the weakness of human intellect, and the wickedness of the human heart? It would be unwise, we think, to adopt a theory whereby the topics upon which weakness or wickedness might act would be multiplied and the range of error enlarged. These topics are unhappily, in despite of the wisdom and caution of the law, but too numerous. The maxim of law that '*the worn way is the safe way*,' we think, wise, and forbids us to look out of the record of a suit for the parties thereto.

"Being of opinion that the appellees were not bound by the suit and decree therein of Craig *v.* Allin and Wife from maintain-
389 ing this action, it became necessary to examine the entry of Mallory, under which they claim."

This opinion speaks for itself. It shows that this court thoroughly considered the subject in all its important bearings, and we submit that the evil consequence- of departing from the old rule "that the record shall import absolute verity" and substitute*d* another, viz., "that the record may be added to or subtracted from or varied in any way by parol testimony," were not in the least exaggerated by this court.

This rule, so clearly laid down in the case last cited, has never been departed from in Kentucky, but has often in varied forms been reaffirmed, sometimes in cases which hold that one not named as a party cannot be proceeded against as such, even though he voluntarily entered his appearance; sometimes in cases where judgment has gone on a cross-petition against one who was a party and duly served on the original bill, but not named as a party in the cross-bill. In all such cases this court has steadily pursued the principle in the case last cited, called the "worn way," upon the idea, we presume, that it was the only safe way. In the case of Plummer *v.* Crane, 5 Monroe, 377, this court held that the only way to make one a party to a suit was to name him as such in the petition.

In that case the plaintiff sued on a note executed by Reuben Plummer and John Plummer, the former being named as a defendant and process being served upon him. The latter, not being

named as a defendant, came voluntarily into court andentered
390 his appearance. At the succeeding term a judgment by default went against both. This court reversed the judgment against John Plummer on the ground that he was not a party and was not made such by his voluntary entry of appearance, the only way to make him a party being by pleading.

To substantially the same effect see Bond *v.* Hendricks, 1 Marshall, 393; Green *v.* McKinley, 6 J. J. Marshall, 197; De Wolf *v.* Mallott, 3 Dana, 216; Taylor *v.* Walker, 4 B. Mon., 568; Johnson *v.* Morrison, 5 B. Mon., 106; Buford *v.* Rucker, 4 J. J. Marshall, 551; Anderson *v.* Ward, 6 Monroe, 419; Cavin *v.* Williams, 8 Bush, 346, overruling Jenkins *v.* Smith, 4 Met., 380; Gatewood *v.* Rucker, 1 Monroe, 21; Barnes *v.* Wise, 3 Mon., 172.

In this last case the person, though not named as a party defendant, had a subpœna served upon him. A state of facts was shown which it was contended made him the real defendant. He testified in the case at great length and with great particularity, and stated that he was willing to do that which the decree directed him to do, but he subsequently appealed, and this court held "as to any redress against White, it cannot be granted in this cause, for we do not count him a party. He is named in the bill, but not made a defendant. The subpœna issued against him, but he never answered, nor were any steps taken against him. Hence we cannot consider his name in the subpœna anything but a clerical mistake. His deposition is taken in the case, in which he states the contract minutely and declares his readiness always to fulfill it by executing his bond."

In this case White sold a house and lot to one Barnes
391 for $800, the purchase price being all paid except $100. In this situation Barnes sold the same property to Ross Wise, for which he executed his several promissory notes, one for $200, another for $225, and a third for $100, and the residue of the price was paid to Barnes. White was present at the sale, and there being $100 still due to him from Barnes, by agreement of the parties the last note of $100 was executed by Wise directly to White instead of Barnes, which discharged Barnes from that balance due for the property. The note for $200 Barnes assigned to one Kelly, and that for $225 to ene Anderson, and White assigned the note for $100 executed to him to Poston and Hunter. Kelly and Anderson each brought suits on their respective notes against Wise and obtained judgments at law.

To enjoin these judgments and to set aside the whole contract Wise filed his bill, setting forth as the sole ground of equity on which the contract should be annulled that it was by parol merely on the part of Barnes, and that no wroting of any kind was signed or executed between them, except the notes executed on his part. For that reason he contended that the contract was void under the statute of frauds. He did not state what were the stipulations on the part of Barnes as to title or what kind of conveyance he was to make or when, nor did he complain that Barnes ever refused to comply with his verbal assurances or suggest any impediment in

the way of obtaining title. He asserted that both Barnes and
392 White were now insolvent. Barnes, in his answer, alleged that he was to give the possession of his lot, which he did do, and that Wise had ever since held it, and that he made no verbal assurances or promises with respect to the title, but that Wise was to look to White for the title, and that White, who was present, agreed to secure the title, and was to stand in the same relation to Wise which he had previously done to Barnes, and that to bind White to Wise he, White, was to give a new bond to Wise, and Barnes was to surrender the bond which he held on White, and that he had not only been ready to do so, but, in point of fact, Wise had obtained from him his bond on White for the purpose of writing another by it, and had retained it ever since; that White was always ready to give such bond to Wise, but Wise had neglected to procure it to be executed when he had undertaken to do so. The court below, on hearing, dissolved the injunction and dismissed the bill, with costs and damages as to the assignee, Kelly, and perpetuated the injunction as to Anderson, directed the note held by Poston and Hunter to be surrendered, and set aside the contract, and decreed that Barnes should refund, with interest, what he had received, as well as the amount of Kelly's judgment, with costs. This court reversed the decree upon the ground that the parol sale of land, though voidable, was not void.

This particular feature of this case may be now regarded as overruled. Under the circumstances as here detailed we have seen that the court refused to grant any relief whatever against White
393 upon the ground that he was not named as a defendant, though he was mentioned in the bill, and actually appeared and testified to the fact that he was willing to carry out his contract. To the same effect, see Maderis *v.* Catlett, 7 Monroe, 477.

Many of these cases seem to recognize only propositions extremely elementary, but we submit with deference that they nevertheless conflict with the proposition, when reduced to its last analysis, asserted by the court in that part of its opinion of which we complain.

But if this court is now willing in a case where the point is not involved to overrule or to ignore the well-considered opinion in Allin *v.* Hall, *supra*, which has now been the law of this State for over seventy-five years, and ignore the principle settled in the other Kentucky cases, viz., that the only way to make one a party to a suit is to name him as such by a pleading duly filed in the cause and have process served on him, and adopt what may for the purpose of argument be admitted to be the rule in some of the cases cited by the court, then we desire to repeat that *none* of these cases is authority for the position that the Louisville & Nashville Railroad Company *is already a party* to this litigation. The most that any of them hold is that the Louisville & Nashville Railroad Company would in a new suit against it be concluded by the judgment in the old case.

In Freeman on Judgements, sec. 141 (4th edition), it is stated:
394 "A judgement against a party not named in the complaint nor in any part of the record is void where it does not appear

that he was a party intended to be sued by one of the names inserted in the complaint, or that he was served with process. It will not be presumed that one who does not appear to have been a party had his day in court."

But if the suggestion of the court is entirely sound the inquiry will necessarily still be open, How far is the Louisville & Nashville Railroad Company concluded by that judgement? Certainly on no question not involved in that litigation.

If it be admitted that the judgement is conclusive that the profits found by the court were actually made, surely that is all the judgement can be said to be conclusive on, and there will yet remain open the question whether a lien can be maintained on the property of the Louisville & Nashville Railroad Company to secure the payment of that amount or whether the Louisville & Nashville Railroad Company can be made personally liable thereon.

What defense the Louisville & Nashville Railroad Company may be able to present on these questions, when they are properly raised, it must be admitted this court does not and cannot know, and we therefore submit that it is not proper for the court, in advance of such knowledge, to declare that litigation on that question will be "needless."

395 We therefore ask this court to eliminate from its opinion the discussion on the question not involved in the case, and to affirm the judgement upon the obvious ground that the pleadings had performed their office and there was nothing to amend.

On this question we think the case of Brown *v.* Vancleave, 86 Ky., 381, and Meadows *v.* Goff, 90 Ky., 540, are clearly in point. The mere fact that one judgement was paid would not alter the case. If an amendment setting up a new cause of action could be filed after the court lost control over that judgement it could be done, even though that judgement had been paid. With respect to the question of power or propriety, the question is the same in both cases, and surely it must be admitted that the reasoning of the court in refusing in Brown *v.* Vancleave to allow such an amendment applies equally to either state of case. The court in that case said:

"But, as just said, the rights of the parties had been litigated to a final judgement. After the rendition of that judgement, could the appellee, without first having that judgement set aside and the case reopened, have filed an amended petition, either setting up new plants or enlarging or perfecting old ones? We think not. Could he, after the judgment was rendered, have filed an amended petition setting up that the appellant was indebted to him in an additional sum of money? We think not. By the rendition of that final judgement the power of the court is spent, except for the purpose of setting aside the judgement or modifying it at the

396 same term, as may be provided by the rules of pleading, and the rights of the parties thus settled by the final judgement are at an end. The litigated questions raised by the pleadings are merged in the judgement. The pleadings thus having fulfilled their office, there is nothing remaining before the court to be

amended, and any amendment thereafter filed over the objections of the adversary and the subsequent proceedings thereon, including the judgement, *are mere nullities.*" (Our italics.)

And in Meadows *v.* Goff the fact that the party who was seeking to open the case was a third party and not one of the parties to the case presented for the consideration of the court the same question as if it was sought to bring in that third party by one already a party. The reason for not allowing further pleadings in the Meadows *v.* Goff case is precisely the reason which we have just seen was advanced in the Brown *v.* Vancleave case. Thus the court says:

"The office of pleadings is to make known to the court the cause of complaint or the cause of defense, and the court is to look to the pleadings alone to determine what the cause of complaint or defense is. This is why written pleadings are required. When the issue made by these pleadings has been passed upon by the court and gone into judgement their office is at an end. They are no longer in court for any purpose whatever, except as containing the evi-
dence of the authority of the court to render the judgement,
397 which is alone looked to as containing the rights of the parties upon the issues that they had theretofore made. Accordingly, we have held in the case of Brown *v.* Vancleave, 86 Ky., 381, that after a final judgement had been rendered in a case the parties thereto have no right to file amended pleadings.

"The judgement rendered in this case against Henry Meadows, now one of the plaintiffs, by his default terminated the office of the pleadings and precluded any right of either party to thereafter plead unless he should acquire the right by obtaining a new trial, and thereby vitalizing the pleadings so as to allow amendments, etc. The appellant Nancy was not before the court in the action against her husband, but she had the right by petition to have herself made a party to the action and set up her right to the land at any time before judgement was rendered; but after the judgement was rendered her right to appear in the action was cut off, because there was then no action pending for the purpose of allowing any further pleading whatever by either party to the action or by a stranger to it."

In this last case we also find it recognized as beyond question that a judgement binds no one except the parties to the action or their privies. This part of the case would have been properly cited under the discussion already closed; but, though out of its logical arrangement, we here quote what the court, in this late case decided
in the September term of 1890, said on this subject:

398 "Besides, it is a well-settled rule that a judgement binds no one except the parties to the action or their privies; also the appellant Nancy is not a privy of her husband in a matter of this kind, and the judgement against her husband deciding that the land belonged to the appellee and that the appellee was entitled to the possession of it does not bind her. That judgement only establishes the fact, so far as others are concerned, that as between the appellee and Henry Meadows and his privies the land and possession thereof belonged to the appellee; but the appellant Nancy

was not a privy of the appellant Henry. Hence she was not bound by the judgement either as to the right of title or of possession, because as to the former he had no right, and as to the latter his right was in virtue of his wife's right of possession and in trust for her benefit equally with himself, which he is entitled to by reason of her right, and which he cannot be deprived of by an adverse claim of right like this one."

The only question that remains open, therefore, is whether the judgement entered in this case against the Louisville, Cincinnati & Lexington Railway Company upon the return of the case to the lower court is final, and upon this question we do not see how there can be a doubt nor do we understand that there is any doubt expressed either by counsel or by this court. The Louisville,
399 Cincinnati & Lexington Railway Company has been ordered to pay the money into court. The parties have a right, without seeking the aid of the court, to take execution, and there is no element of a final judgement wanting in this judgement. That judgement remains unaffected. It has been now nearly two years since it was entered. There has been no appeal from it. It has not been superseded. It had been entered about a year before there was any attempt to file the amended and supplemental petition. Under these circumstances it seems perfectly obvious that the authorities last referred to are distinctly in point.

Respectfully submitted.

HELM & BRUCE,
Attorneys for Appellee.

Authorities Reviewed and Cited.

Brown *v.* Vancleave, 86 Ky., 331.
Meadows *v.* Goff, 90 Ky., 541.
Wiggins Ferry Co. *v.* O. & M. R'y, 142 U. S., 415.
Heckman *v.* L. & N. R. R. Co., 85 Ky., 638.
L. & N. R. R. Co. *v.* Hall, 12 Bush., 131.
Eagle, &c., Co. *v.* Bradley, &c., Co., 50 Fed. Rep., 193.
Eagle, &c., Co. *v.* Bradley, &c., Co., 57 Fed. Rep., 981.
Wood *v.* Ensel, 63 Mo., 193.
Palmer *v.* Hays, 112 Ind., 292.
Warfield *v.* Davis, 14 B. Mon., 41.
Claflin *v.* Fletcher, 7 Fed. Rep., 851.
Linton *v.* Harris, 78 Ga., 265.
400 Davenport *v.* Muir, 3 J. J. Mar., 310.
Robbins *v.* City of Chicago, 4 Wall., 657.
Boston *v.* Worthington, 10 Gray, 496.
Milford *v.* Hollrood, 9 Allen, 17.
Estel *v.* Peacock, 48 Mich., 471.
Stoddard *v.* Thompson, 31 Iowa, 80.
Valentine *v.* Mahoney, 37 Cal., 391.
Strong *v.* Phœnix Ins. Co., 62 Mo., 289.
Lovejoy *v.* Morray, 3 Wall., 1.
Cole *v.* Favorite, 69 Ill., 457.

State *v.* Johnson, 25 S. W. Rep. (Mo.), 855.
Hope *v.* Myor, 72 Ga., 246, and 40 Conn., 298.
Moseley *v.* Cocke, 7 Leigh (Va.), 224.
Allin's Heirs *v.* Hall's Heirs, 1 Mar., 525.
Lummer *v.* Crane, 5 Mon., 393.
Green *v.* McKinley, 6 J. J. Mar., 197.
De Wolf *v.* Mallott, 3 Dana, 216.
Taylor *v.* Walker, 4 B. Mon., 568.
Johnson *v.* Morrison, 5 B. Mon., 106.
Buford *v.* Rucker, 4 J. J. Mar., 551.
Anderson *v.* Ward, 6 Mon., 419.
Cavin, &c., *v.* Williams, &c., 8 Bush., 346.
Gatewood *v.* Rucker, 1 Mon., 21.
Barnes *v.* Wise, 3 Mon., 172.
Freeman on Judgments, sec. 141 (4th edition).
Bond *v.* Hendricks, 1 Mar., 393.
Maderis *v.* Catlett, 7 Mar., 437.

401 Court of Appeals of Kentucky.

A. L. SCHMIDT, Trustee, Appellant,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON Railway Company, Appellee.
} Supplemental Petition for Modification.

We file this supplement to our petition for modification simply to call the court's attention to a case which we had overlooked. In our original petition for modification we quoted largely from the case of Allen's Heirs *vs.* Hall's Heirs, 1 Marshall, 525, which seems to us practically conclusive of the case now before the court, and we said that it had never been overruled or doubted. We had not then been able to find where it had been expressly cited or approved, but since filing our petition we have read the case of Memphis & St. Louis Packet Company *vs.* Grey, 9 Bush., 137, 148, which expressly cites and approves the case of Allen's Heirs *vs.* Hall's Heirs, *supra*, on the question of who are bound by the judgment in an action.

Respectfully,

HELM & BRUCE,
Att'ys for Appellee.

MAY 9, 1896.

Came appellants, by counsel, and filed a reply to the petition for rehearing herein.

402 The following is the reply filed by the foregoing order:

Court of Appeals of Kentucky.

A. L. SCHMIDT, Trustee, Appellant,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., Appellees.

Response to Petition for Modification.

The petition for modification is an extraordinary document. It begins with a request of the "court to modify its opinion by striking therefrom what we conceive to be *extrajudicial or what may be called the advisory part thereof.*"

After the petition has been examined it will be seen that it would more appropriately have been entitled a petition to the court to strike its opinion from the files and enter up a judgment in behalf of Mr. Helm's client. It undertakes to point out to the court that its own opinion "confesses the error of its statement of the questions involved."

On page 7 it says, "We submit that this court, in the same opinion, confesses the error of its statement of the questions involved in the following words:

"This question, while not strictly before the court upon this appeal, has been considered and decided to the end of preventing needless litigation."

Let us see what this has reference to, and it will then appear to be entirely proper:

403 The court, after having decided the merits of the controversy, to wit, that the Louisville & Nashville railroad had been the real defendant, closes the opinion as follows:

"Proceedings in this litigation were not ended by the judgment rendered after the last appeal. Undoubtedly, the appellants could not only take steps to enforce the satisfaction of the judgment then rendered, but they could proceed to subject net earnings accruing to the Louisville, Cincinnati & Lexington Railway Co. (if that company had been the real defendant) since the last net earnings reported before the report 'R. E. S. #2' was made. So, too, they may, in our judgment, proceed in this litigation to subject those earnings in the hands of the Louisville & Nashville Railroad Co., if it be, as alleged in the amended petition, the real party defendant in this suit (Wiggins Co. *vs.* O. & M. R'y Co., 142 U. S., 292). This question, while not strictly before the court upon this appeal, has been considered and decided, to the end of preventing needless litigation."

That is an indication to the lower court that when it comes to enter up a final judgment the earnings should be ascertained up to that date from 1890, up to which time they have already been ascertained, in accordance with the former opinion of this court.

404 It simply points out to the lower court the mode of executing the mandate of this court under this opinion, and this record shows that this question arose immediately after the

case went back from the court of appeals the first time. A motion was made for a reference to the commissioner to report the net earnings accrued since the date of the last report of earnings in 1890.

This motion was resisted on the ground that the report of 1890 was a finality, and that we would be compelled to bring a new suit for what accrued after that time.

We maintained that the court still had control of the subject-matter of the litigation, to wit, the earnings of this road, and that we were entitled to have them ascertained and paid to us up to the final disposition of the action, and the court below made the order of reference, but not until it was ascertained that Judge Hazelrigg's former opinion provided for the same contingency.

The closing language of that opinion is: "The judgment is reversed with directions to take the report indicated herein *as the basis* for further proceedings consistent with this opinion."

No intimation there that the confirmation of report "R. E. S. #2" was to be *an* end of this case. On the contrary, it is to be taken as *the basis* for ascertaining future earnings up to the final judgment herein. The wisdom of the court in giving this direction is made manifest by the petition for modification. Otherwise there
405 would have been another appeal on that subject inside of twelve months, and this litigation, which has already been protracted ten years, would never come to an end.

The petition on page 7 says, in effect, that "it is only because of the use of such language and what the court has said on a question admitted by it to be not before it on this appeal" that a further presentation of the case is made in order to remove what is deemed to be an "erroneous impression from the court's mind."

But it will be observed that the petition does not discuss at all this question which it says the court ought not to have decided. It is merely a lengthy rehash of the old argument on the merits of the controversy and an attempt to show the court that it does not understand the import of a single case of the many which it cites in support of its opinion.

We will not weary the court with a further consideration of these authorities or of the matters in controversy, which have already been so thoroughly considered in written and oral arguments and in the exhaustive opinion of the court.

The petition does not point out that the court has overlooked anything in the record or cite a solitary new principle of law.

The petition also proceeds upon a false assumption that this is an action for a personal judgment, whereas it is a proceeding *in rem* to subject the net earnings of the road to pay the interest on
406 our bonds. We are entitled to these earnings both under the mortgage and under the lease. The mortgage puts them in lien to us, and the Louisville & Nashville road took the property subject to this lien. The lease expressly covenants that these earnings shall be applied to these bonds, and the Louisville & Nashville road, as the assignee of said lease (and having operated said road over fifteen years under said lease), has adopted its covenants as its

own and is bound to apply said earnings to the payment of said bonds.

So decided by the Supreme Court of the United States in the case of The Wiggins Ferry Co. *vs.* The O. & M. Railway Co. (143 U. S., 292), improperly cited by the court, so the petition says.

The Supreme Court says in that case: The railroad company having taken possession of the road, "doing and performing all that the terms of said contract required the Ohio & Mississippi Railroad Company to do, *we think it must* be held in a court of equity to have adopted such contract and made it its own."

II.

We shall, of course, enter upon no defense of the court's review of the authorities. Principles announced by them are not only plain, but have been heretofore announced twice by this court. The old case of Craig *vs.* Allen, so much vaunted by counsel, was not supposed by the court to have any application to this question when it decided the cases of Hall *vs.* L. & N. and Heckman
407 *vs.* L. & N.; but we shall waste no time discussing that case, inasmuch as this court has been shown to be in line by the Hall case and Heckman case with the numerous other cases cited in its opinion in this case, and this opinion simply reannounces the principle therein involved.

III.

The gist of complaint made by appellee's counsel that this court ought not to have considered at all the questions which it decided and of the contention that it ought now to expunge nine-tenths of its opinion is completely refuted by this court in its opinion, page 5.

The court says: "This appeal therefore presents two questions for decision: First, whether, upon the facts alleged in the amended petition and disclosed by the record, the Louisville & Nashville Railroad Company is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellant's claim."

The whole quarrel now raised with the court is that it decided the first question which it propounded as arising for decision.

We shall not discuss this question. That the question decided was obviously the "first question" arising was manifest to the court at the outset.
408 And if the court might have placed its decision upon the second question without discussing the first, whether or not it would do so was for the court and not for one of the litigants to decide.

Any lawyer familiar with the decisions of courts knows that it is of daily occurrence for courts to discuss principles and lay down rules for decision in order to control the lower court in future liti-

gation or even for the purpose of precedent when the court might have shirked the duty altogether had it so desired.

This litigation has been in court for about eleven years, and a claim held just by this court several years ago still remains unpaid, and the ground of the complaint made by appellee is that the court has announced principles which may lead to a curtailment of future litigation.

We respectfully submit that the opinion is eminently proper and just and can have none other but a beneficent effect.

SIMRALL, BODLEY & DOOLAN AND PIRTLE & TRABUE, *For Appellants.*

JUNE 17, 1896.

The court, being sufficiently advised, delivered a response modifying the opinion herein; it is therefore considered that the petition for modification herein be overruled.

409 Afterwards, on the 11th day of November, A. D. 1896, came the appellants, Adolph L. Schmidt, &c., by attorneys, and filed in the office of the clerk of the Ky. court of appeals a transcript of record in words and figures following, to wit:

STATE OF KENTUCKY, }
Jefferson County. }

Pleas before the Honorable Sterling B. Toney, judge of the Jefferson circuit court, law and equity division, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned.

ADOLPH L. SCHMIDT, Individually and as Trustee for Owners of Bonds of the Northern Division of the Cumberland and Ohio Railroad Company; Jacob Peter, James McCarty, George H. Breed, P. Booker Reed, Eliza S. Reed, Jane M. Reed, Leander S. Reed, W. C. Reamer, and Jacob Krieger, Sr., for Themselves and Other Owners of said Bonds, Plaintiffs,

vs.

LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, Defendant. } #1860.

Be it known that heretofore, to wit, at a court held on the 27th day of June, 1896—

Came A. L. Schmidt, trustee, and others, by counsel, and
410 filed two notices herein.

And thereupon A. L. Schmidt, trustee, and others file herein the mandate and opinion of the court of appeals herein and the affidavit of A. L. Schmidt, trustee, based thereon, and move for a rule against the Louisville & Nashville Railroad Company to compel them to pay into court the sum of $53,565.62, as shown by the report herein of R. E. Sewell marked R. E. S. No. 2, together with interest on the said items as they should have been applied

under the contract for the payment of interest on said bonds semi-annually, said money to be paid into court at such time as the court may designate.

Plaintiffs also move that this action be referred to the commissioner to ascertain the net earnings on said defendant's road on business coming to it from over the Cumberland and Ohio road, Northern division, since the time of the last net earnings reported herein in said report R. E. S. No. 2, together with the interest thereon from the time such earnings should have been applied under the contract and lease in payment of the interest on said bonds, as decided by the court of appeals herein, said net earnings to be ascertained in the same way as in report R. E. S. No. 2; that the said Louisville & Nashville Railroad Company be directed to produce its books and papers before said commissioner and return to said commissioner the amount of said earnings since the date of said last report, as hereinbefore stated; to all of which defendant, Louisville & Nashville Railroad Company, by counsel, object; and on motion of plaintiff, by counsel, it is ordered that said
411 motion be and is submitted, and the court, not being advised, takes time.

Said notices are in words and figures as follows, to wit:

Jefferson Circuit Court, Law and Equity Division.

A. L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY and Louisville & Nashville Railroad Company, Defendants. } Notice.

You are hereby notified that on Friday, the 26th of June, 1896, at the hour of 10 a. m., or as soon thereafter as the same can be heard in the law and equity division of this court, before Sterling B. Toney, the plaintiffs will file the mandate and opinion of the court of appeals and the affidavit based thereon, and will move for a rule against the Louisville & Nashville Railroad Company to compel them to pay into court the sum of $53,565.62, as shown by the report herein of R. E. Sewell marked R. E. S. No. 2, together with the interest on the said items as they should have been applied under the contract and payment of the interest on bonds, said money to be paid into court at such time as the court may designate.

At the same time the plaintiffs will move that this action be referred to the commissioner to ascertain the net earnings on said defendant's road, the amount of its net earnings on business
412 coming to it from the Cumberland & Ohio road since the time of the last net earnings reported in said report R. E. S. No. 2, together with the interest thereon from the time said earnings should have been applied under the contract in payment of the interest on the bonds, as decided by the court of appeals herein, said net earnings to be ascertained in the same way as in report R. E. S. No. 2, and that the said Louisville & Nashville Railroad Company

be directed to report to said commissioner the amount of such net earnings as hereinbefore stated.

Jefferson Circuit Court, Law and Equity Division.

A. L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY and Louisville & Nashville Railroad Company, Defendants. } Notice.

To the defendants, Louisville, Cincinnati & Lexington Railway Company and The Louisville & Nashville Railroad Company:

You are hereby notified that on Friday, the 26th of June, 1896, at the hour of 10 a. m., or as soon thereafter as the same can be heard in the law and equity division of this court, before Judge Sterling B. Toney, the plaintiffs will file the mandate and opinion of the court of appeals and the affidavit based thereon, and will move for a rule against the Louisville & Nashville Railroad
413 Company to compel them to pay into court the sum of $53,565.62, as shown by the report herein of R. E. Sewell marked R. E. S. No. 2, together with the interest on the said items as they should have been applied under the contract and payment of the interest on bonds, said money to be paid into court at such time as the court may designate.

At the same time the plaintiffs will move that this action be referred to the commissioner to ascertain the net earnings on said defendant's road, the amount of its net earnings on business coming to it from the Cumberland and Ohio road since the time of the last net earnings reported in said report R. E. S. No. 2, together with the interest thereon from the time said earnings should have been applied under the contract in payment of the interest on the bonds, as decided by the court of appeals herein, said net earnings to be ascertained in the same way as in report R. E. S. No. 2, and that the said Louisville & Nashville Railroad Company be directed to report to said commissioner the amount of such net earnings as hereinbefore stated.

Return on Notice.

Came to hand June 25, 1896, at 4.50 p. m. Executed June 26, 1896, on Lou., Cin. & Lex. and L. & N. R. R. Co. by delivering a copy of the within summons to S. R. Knott, vice-president of said company, he being chief officer found in this county at this time.

JNO. R. PFLANZ, *S. J. C.*,
By W. RENFRO, *D. S.*

414 *Mandate, April* 4, 1896.

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

ADOLPH SCHMIDT, &c., Appellants,
against
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Co., &c., Appellees.

Appeal from a judgment of the law and equity division of the Jefferson circuit court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

A copy.

Attest: A. ADDAMS, *C. C. A.*,
By ROB'T L. GREEN, *D. C.*

Issued June 19, 1896.

Affidavit of Adolph Schmidt.

Jefferson Circuit Court, Law and Equity Division.

ADOLPH L. SCHMIDT, Individually and as Trustee for Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company; Jacob Peter, James McCarty, George H. Breed, T. Booker Reed, Eliza Reed, W. C. Reamer, and —— ——, for Themselves and Other Owners of said Bonds, Plaintiffs,
vs.
415 LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Company and Louisville & Nashville Railroad Co., Defendants. } Affidavit.

The plaintiff and affiant, Adolph Schmidt, trustee, states that on the 28th day of July, 1879, the Northern division of the Cumberland & Ohio Railroad Company, a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, and thereby authorized to construct, maintain, and operate the railroad and property hereinafter mentioned, and by an act approved the 18th day of March, 1878, authorized to make and enter into the lease, mortgages, and agreements hereinafter mentioned, executed, acknowledged, and delivered to the Louisville, Cincinnati & Lexington Railway Company, a corporation duly created by an act of the General Assembly of the Commonwealth of Kentucky and by the said General Assembly of the Commonwealth of Kentucky duly

empowered to make and enter into the lease, contract, and mortgages hereinafter mentioned, an indenture of lease in writing, which was then and there received and accepted by said lessee, wherein the said lessor let to the said lessee all that part of said lessor's unfinished road-bed, rights of way, with improvements and appurtenances, depots and depot grounds, machinery, tools, and implements, together with all its property, rights, and franchises, including unpaid subscriptions to capital stock, deeds, and demands belonging to or in anywise appertaining to said lessor's line of railway from its intersection with said lessee's railway at the town of
416 Eminence, Kentucky, thence southwardly through a portion of Henry county and the counties of Shelby and Spencer and to Bloomfield, in Nelson county, all in the State of Kentucky, for the period of thirty years from the date of said lease, upon the terms and for the consideration of the mutual covenants and stipulations expressed in said lease.

In said indenture it was stipulated that the president and directors of the lessor should execute, under the direction of its stockholders, upon all the property, rights, and franchises belonging to or in anywise appertaining to said lessor's line of road aforesaid for the security of $350,000 of mortgage coupon bonds to run twenty years and bearing interest at the rate of 7 per cent. per annum, payable on the 1st days of June and December in each year, to be executed by the lessor as provided in its charter and delivered to the lessee within sixty days after delivery of said lease.

In said lease the lessee stipulated that said bonds or proceeds should be used by it in the construction of said lessor's said line of railway, and for no other purpose; that should the lessee be unable to dispose of $250,000, face value of said bonds, the proceeds to be in money, materials, or labor, by September 1st, 1880, said lease should terminate and the parties thereto be released and the lessee restore to the lessor all said bonds, provided that no absolute sale of any of said bonds should be made by the lessee unless nor until it could place not less than $250,000 in value thereof in money or its equivalent, and when that quantity thereof
417 should have been disposed of by lessee it should, as soon as practicable, and not later than September 1st, 1880, begin the construction of said lessor's said line of railroad, and that a failure to so begin should operate to terminate said lease; that upon disposing of $250,000 of said bonds as aforesaid the contract should be binding on the parties and the line from Eminence to Bloomfield be commenced, and when begun should be pushed to completion as rapidly as possible; that no bond should be sold with past-due coupons annexed; that the line of railroad constructed should be first class; that the lessee should furnish all necessary engines and rolling stock to operate the railway at the price agreed on, but the lessor reserved the right to furnish such part thereof as it could at same compensation.

It was stipulated that the lessee should make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping road-bed in order, and the net

profit arising therefrom should be applied to the payment of interest, and provide for sinking fund and retire said mortgage bonds; but out of the gross earnings should be first deducted annually $1,000 which should be paid to lessor, with which to pay expenses of keeping up its organization, and if the net earnings should prove insufficient to pay interest and provide for sinking fund aforesaid the lessee, if all other sources of raising money of said lessor should prove insufficient, should supply the deficiency as far as it might be done by appropriating the net earnings, or so much as might be needed on its own lines, which might accrue by reason of
418 business coming to it, said lessee, from or over said lessor's lines, and that such pledge and agreement should be made effectual by mortgage properly executed, acknowledged, and recorded, and should it become necessary to use any of the net earnings on the lines of the lessee to pay said interest and sinking fund, or any part of either, then all amounts so used, as well as all moneys paid for said lessor by said lessee, should be treated as interest-bearing debts, interest at the same rate as said mortgage bonds should bear, the debt and interest to be repaid out of said net earnings thereafter accruing to said lessor on its own lines which might be so appropriated consistently with the other terms of said lease, and for all sums of money that might become due from said lessor to said lessee on this or any account a lien should be and was thereby created upon all the property, rights, and franchises of said lessor owned or to be acquired in favor of said lessee, to stand next in priority to said mortgage and bonds for $350,000 as aforesaid, but said lessee should not enforce the collection of said debts or any of them by enforcement of said lien until at least eight years should have elapsed from and after the creation of the same.

It was stipulated that whenever the net earnings from the leased premises should suffice to pay the interest and sinking fund on said $350,000 of bonds, or such portion thereof as might be out-
419 standing, and to repay said lessee all dues and demands when due or owing, the surplus net earnings, unless used in retiring said bonds as provided in said mortgage, less one-tenth thereof, should be paid over to said lessor; said one-tenth of said net earnings to be retained by said lessee for its own use.

It was stipulated that said lease should not be assigned without the lessor's consent, and that during its duration the lessee should pay all taxes lawfully assessed and charge the amount to operating expenses, and should restore the leased premises to lessor in good repair at the termination of the lease, unless extended by mutual consent or the lessee be prevented by unavoidable casualty, legal proceedings, or operation of law.

It was stipulated that the lesses should furnish any means necessary to complete the line from Eminence to Bloomfield which should not be derived from the sale of the bonds to be issued by the lessor, and should furnish any means necessary to pay any interest to become due on said bonds previous to completion of said line which might not be derived from the earnings of said road, any means so furnished by lessee to become a lien debt, payable on the

same terms as previously provided in regard to its other indebtedness against lessor.

It was stipulated that if the lessee were hindered in beginning or completing the railway by act or omission of the lessor or by legal or equitable proceedings, the period or periods of such delay
420 should not be counted as part of the time within which the lessee was obliged to perform any act under the agreement.

Affiant further states that afterward, to wit, on the same day, to wit, the 28th day of July, 1879, the said lessee executed and delivered to Joshua F. Speed, as trustee, an indenture of mortgage, wherein, among other things, it was provided that whereas by authority of an act of the General Assembly of the Commonwealth of Kentucky approved the 18th day of March, 1878, the mortgagor had contracted with the Northern division of the Cumberland & Ohio Railroad Company for lease, construction, and operation of the latter's railway from Eminence aforesaid through a part of Henry county and the counties of Shelby and Spencer to Bloomfield aforesaid, said lease to continue for thirty years on the terms specified, in which it was stipulated on behalf of the lessor that if the net earnings of the leased premises should prove insufficient to pay the interest and provide the sinking fund of 350 bonds of $1,000 each, bearing interest at seven per cent. per annum, payable semi-annually on the 1st days of June and December, running twenty years from July 2nd, 1879, to be issued by said lessor, and if all the sources of raising money of said lessor fail to provide for said interest and sinking fund, then the said mortgagor, Louisville, Cincinnati & Lexington Railway Company, should supply the deficiency so far as same might be done by appropriating the net earnings, or so much thereof as might be needed, on its own lines which might accrue to it by reason of business coming to it from or over the said
421 lines of the said Northern division of the Cumberland & Ohio Railroad Company; and whereas the contract or lease had been consummated by action of the stockholders of the lessor, and it was desired to carry into effect said stipulations as to said net earnings, said mortgagor, in consideration of one dollar cash in hand paid to it by said Speed, trustee, and of the premises, thereby mortgaged and put in lien all net earnings which might accrue to it by reason of business coming to it from or over said lines of the Northern division of the Cumberland and Ohio Railway Company to said Joshua F. Speed as trustee aforesaid (who it was recited in said mortgage was the trustee for the mortgage made by said Northern division of the Cumberland and Ohio Railroad Company to secure said 350 bonds of $1,000 each), conditioned that if the net earnings of said leased premises should prove insufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said mortgagor, if all other sources of raising money of said lessor should prove insufficient, would supply the deficiency, so far as it might be done, by appropriating and paying over promptly the net earnings, or so much thereof as might be needed, on its own lines which might accrue by reason of business coming to it from or over said Northern division of the Cumberland & Ohio Railroad Com-

pany lines for the purpose of discharging said interest and sinking fund as they should severally fall due.

Said indenture of mortgage was duly acknowledged by said mortgagor, Louisville, Cincinnati & Lexington Railway Company,
422 before and recorded by the clerks of the county courts, respectively, of Spencer, Shelby, Henry, and Jefferson counties, in their respective offices, and a copy of said mortgage is filed as Exhibit "C" with the petition and made a part hereof.

Affiant further states that, pursuant to the terms of said lease, the said lessor, on or about the — day of July, 1879, delivered to the said Joshua F. Speed, trustee, a deed of mortgage, which was duly acknowledged before and recorded by the clerks of the county courts of Spencer, Shelby, Henry, & Jefferson counties, in Kentucky, copy of which said mortgage is herewith filed and made a part hereof, marked "A," wherein said Northern division of the Cumberland & Ohio Railroad Company conveyed to said Speed, trustee, all the property, rights, and franchises of said mortgagor, including all its right, title, and interest, free from all lien, mortgage, or claims of any kind in and to its lines of railroad from its point of intersection with the line of road of the Louisville, Cincinnati & Lexington Railway Company, in the town of Eminence aforesaid, through Henry, Shelby, and Spencer counties, and to Bloomfield, in Nelson county aforesaid, together with all improvements, appurtenances, rights of way, lands adjacent thereto, machinery, tools and implements, fixtures and supplies of every description, so as to vest in the said Speed, trustee, all the right, title, and interest of the said Northern division of the Cumberland & Ohio Railroad Company in and to all the property by it owned or in which it had any interest at the date of the execution of said mortgage, or there-
423 after to be acquired by it. Said conveyance was made to secure the payment of 350 bonds by said mortgagor issued for $1,000, each dated July 2nd, 1879, payable 20 years after date, in each of which said mortgagor promised to pay bearer $1,000 twenty years thereafter, with interest at the rate of seven per centum per annum, payable semi-annually. By said mortgage it was provided that all said property so conveyed should be held by said trustee for the joint and equal security of the principal and interest of each of said bonds without regard to the time when said holders might become possessed thereof.

By said mortgage it was provided:

"That in the event of the death, resignation, failure, or refusal to act of said Speed, trustee as aforesaid, it should and might be lawful for the Shelby circuit court, upon the application of the parties holding said bonds to the amount of $70,000 or more, to appoint a trustee or trustees, in lieu and stead of said Speed, and that the trustee or trustees so appointed, should thereupon succeed to and be vested with all the rights, powers, and privileges which were by said deed of mortgage conferred upon said Speed or intended so to be."

Affiant states that afterwards, to wit, on the — day of January, 1880, and after the delivery of said lease and both said mortgages, the said Northern division of the Cumberland & Ohio railroad as

first party, the said Louisville, Cincinnati & Lexington Railway Company as second party, and said Joshua F. Speed, trustee,
424 as third party, made, executed, and delivered, each to the other, a certain contract, wherein, among other provisions it is recited and stipulated:

"That for and on account of the difficulties of carrying into effect the contract of the parties of the first and second parts hereto in relation to the lease, construction, and operation of the said first parties' proposed line of railway from Eminence to Bloomfield, of date the 28th day of July, 1879, said parties have, and do hereby, agree upon the following change and modification of said contract and the mortgage therein named, to take effect when and as soon as this change and modification shall have been duly and properly approved by majority of the stockholders of each of said companies, and fully executed and recorded in the proper offices, when to all intents and purposes the said contract so amended and modified shall be recorded and taken as the true contract and agreement between the parties hereto.

First. Whenever said second party shall be able to dispose of said mortgage bonds provided for in said contract and mortgage, amounting at their face value to the sum of $150,000, said bonds numbered from one to 150, inclusive, the proceeds in money, labor, or materials, the same may be done, and then this contract as amended and in all its particulars becomes absolute and the construction of that portion of said first party's line of railway between Shelbyville and Bloomfield shall be commenced and pushed to completion as rapidly as possible; and the failure to complete said road so
425 as to permit the safe and regular passage of trains between Shelbyville and Bloomfield within two years from the commencement of work thereon shall, at the option of said first party, after six months thereof, operate as a forfeiture of said lease. But no disposition of any of said bonds shall be made until not less, in amount, than $150,000 at the face value thereof, numbered as aforesaid, can be placed for money or its equivalent.

Second. Not more than two hundred and fifty thousand dollars of the face value of said bonds, numbered from 1 to 250, inclusive, shall be used or disposed of in and about the construction of said railroad between Shelbyville and Bloomfield, and one hundred thousand dollars of the face value of said bonds, numbered from 251 to 350, both inclusive, shall be set apart and faithfully preserved, in such manner as the boards of directors of the first and second parties may agree, for the ultimate construction of said first party's road between Eminence and Shelbyville; but said second party shall not be bound to begin the construction or operation of said last-named portion of said railroad until, in the judgment of the board of the said second party, the operation of the same would result in sufficient earnings to pay operating expenses and interest and sinking fund on the amount required to complete the same. And the mortgage heretofore made to Joshua F. Speed, trustee therein, is hereby so modified that the said two hundred and fifty bonds to be used in constructing said railroad between Shelbyville

and Bloomfield shall constitute no lien on that part of said
426 company's road between Eminence and Shelbyville until said one hundred bonds, set apart for its construction, shall have been used for that purpose, and then all of said bonds issued shall be a joint and equal lien on the whole property as set out in the original mortgage, and the said Speed, as trustee, is made a third party hereto and shall sign this contract as evidence of his consent to the modifications in this respect of the said mortgage, it being agreed and understood that, at this date, none of said mortgage bonds have been sold or disposed of, but remain in the hands of said second party, provided, that unless the second party shall complete the construction of so much of said party's road as lies between Shelbyville and Eminence within five years from the first of September, 1880, then the lease of said last-named part of said road shall determine and terminate at the option of said first party after six months' notice, and in the event of such termination of the lease said bonds, numbered from 251 to 350, both inclusive aforesaid, and the coupons thereof, shall at once be cancelled so as to prevent their circulation, or if the boards of the parties aforesaid so order it, they shall be destroyed.

Third. Before any of said bonds, numbered from 1 to 250, both inclusive, shall be sold or disposed of, each shall have a printed or lithographed indorsement thereon to the effect that none of them or their coupons have any lien upon the company's property or franchise or line of road north of Shelbyville until the one
427 hundred bonds aforesaid are issued or used, and that portion of said road between Shelbyville and Eminence shall have been completed, and then all of said bonds and coupons shall have a common and joint lien on the whole property.

Fourth. The board of directors of the first and second parties may agree to use second-handed rails in building said road or any part of it, said rails to be sufficient for the safe transmission of trains and to be removed and replaced as fast as they become unsafe. The price of said second-handed rails to be agreed upon by said boards before being used.

Fifth. In all respects in which this contract is inconsistent with the original contract or mortgage said originals are abrogated and the contract as modified and amended by this agreement shall be taken as the true existing contract between the parties."

A copy of said contract is filed herewith and made a part hereof, marked "D." It was signed and acknowledged by said Northern division of the Cumberland & Ohio Railroad Company and Joshua F. Speed before and recorded by the clerks of the county courts of Spencer, Shelby, Henry, and Jefferson counties aforesaid; and the modifications mentioned therein of the contract between said Northern division of the Cumberland and Ohio Railway Company and Louisville, Cincinnati and Lexington Railway Company were duly and properly approved by a majority of the stockholders of each of said companies in meetings duly called and assembled.

428 Affiant states that in accordance with the provision of said mortgages, lease, and contract said bonds and coupons

were prepared, signed, and countersigned and made ready for use as in the charter of said Northern division of the Cumberland and Ohio Railroad Company and said mortgage of date July 2nd, 1879, provided, and 250 of said bonds of $1,000 each were issued and delivered to said lessee within sixty days after the delivery of said deed of lease, in each of which bonds it is provided:

"The Northern division of the Cumberland & Ohio Railroad Company hereby promises to pay Joshua F. Speed, trustee, or bearer, the sum of one thousand dollars, on the 2nd day of July, 1899, at the Bank of America, in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable at the same place on the 1st day of June and December of each year, as per coupons annexed, on presentation of said coupons. This is one of a series of 350 bonds, numbered from 1 to 350, both inclusive, and lettered A, and is secured by mortgage dated the 2nd day of July, 1879, made, executed and delivered by said Northern division of the Cumberland & Ohio Railroad Company, to Joshua F. Speed, as trustee, in pursuance of an act of the General Assembly, approved the 18th day of March, 1878. The holder of this bond, together with the holders of the others of said series, is entitled to a first lien for the equal security *security* of principal and interest of each,
respectively, on all the property, rights and franchises of
429 said Northern division of the Cumberland & Ohio Railroad
Company, as also a first lien on the net earnings of the Louisville, Cincinnati & Lexington Railway Company, duly pledged thereto, which may accrue to it by reason of business coming to it over the line of the mortgagor," the said Northern division of the Cumberland & Ohio Railway Company.

Attached to all said bonds were coupons providing for the semi-annual payment of interest on the respective bonds as aforesaid. Affiant states that before the 1st day of September, 1880, said lessee disposed of so many of said bonds numbered from one to 250, both inclusive, as amounted at their face value to $250,000, the proceeds being money, materials, and labor, and so notified the president of said lessor in writing. Said lessee for value sold and transferred said 250 bonds to divers persons upon the bond market, and the plaintiff- and many other persons unknown to plaintiffs became the purchasers thereof and are the owners and holders of said bonds, aggregating many thousands of dollars, as stated in the petition.

Affiant states that none of the interest on or coupons attached to said bonds which became due on and after December 1st, 1883, has been paid to any of the plaintiffs, and they are informed and believe and aver that no such payment has been made to any other owner of said bonds or coupons; that they demanded of said lessee payment of said accrued interest, but payment was refused by said lessee, which denied any liability to pay said bonds or any of
them, and said lessor has likewise refused such payment.
430 Affiant is informed and believes and states that net earnings of said Northern division of the Cumberland & Ohio Railroad Company came into the treasury of said lessee which had

never been applied to the payment of the unpaid and accrued interest aforesaid.

Affiant further states that, afterward, to wit, on the — day of ——, 18—, Joshua F. Speed died, and Shelby circuit court, upon application which was made to it by the holders of the aforesaid bonds to the amount of more that $70,000 to appoint a trustee in lieu of said Speed in the mortgages and contracts aforesaid, *the said Shelby circuit court*, by order, duly entered, duly appointed plaintiff Adolph Schmidt such trustee to succeed to and be vested with all the rights, powers, and privileges which were by the said deeds of mortgage and other contracts conferred upon the said Speed, or intended so to be.

Affiant further states that all the sources of the said Northern division of the Cumberland & Ohio Railroad Company of raising money failed to provide for the said interest and sinking fund provided for in the mortgage aforesaid and failed to provide any part of said interest or sinking fund payments, and that it became and is necessary that the amounts thereof should be provided and supplied by appropriating the net earnings of the said Louisville, Cincinnati & Lexington railway and properties accruing to said railroad and properties by reason of business coming to it from or over the said lines of the Northern division of the Cumberland & Ohio Railroad Company.

431 Affiant further states that after the execution of said lease and the execution of the mortgage aforesaid made by said lessee of the net earnings aforesaid which it might make on business coming to it from and over the Northern division of the Cumberland & Ohio railroad, more fully stated in the petition in this action (now amended), the Louisville & Nashville Railroad Company, which at all the times mentioned had notice of the said mortgage and actual knowledge of its contents, on or about the 1st day of November, 1881, by a certain deed bearing said date and recorded in the office of the clerk of the county court of Jefferson county, State of Kentucky, in Deed Book 245, page 1, purchased and received and accepted a conveyance from said Louisville, Cincinnati & Lexington Railway Company of the railroad of the said grantor extending from the city of Louisville, in the State of Kentucky, to the city of Lexington, in said State, and from the junction with said railroad at Lagrange, a point about 27 miles from Louisville aforesaid, to the city of Newport, in said State, together with all depots, real estate, rolling stock, and other property of said grantor, and the franchises of said grantor to operate the said railroad and take the tolls and earnings thereof.

Affiant states that in and by said deed of conveyance said grantor assigned and transferred to said grantee, the Louisville & Nashville Railroad Company, the aforesaid lease, made as aforesaid, to said grantor by said Northern division of the Cumberland & Ohio

432 Railroad Company on the 28th day of July, 1879, together with all the obligations thereof, and said Louisville & Nashville Railroad Company accepted the said assignment and trans-

fer of said lease and therein and thereby assumed to perform the obligations thereof.

Affiant states that prior thereto the said Louisville & Nashville Railroad Company had purchased and acquired and at the time of said conveyance held the capital stock of the said Louisville, Cincinnati & Lexington Railway Company, and as such stockholder took and appropriated and has ever since enjoyed the whole purchase price of the Louisville, Cincinnati & Lexington Railway Company and all its said properties.

Affiant states that after the execution of said deed of November 1st, 1881, said Louisville & Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati & Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern division of the Cumberland & Ohio Railroad Company aforesaid, and began to operate and has ever since operated said railroads and properties and taken and appropriated to its own use the earnings thereof.

Affiant states that at all times since November 1st, 1881, said Louisville & Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by virtue thereof, has operated the said Northern division of the Cumberland & Ohio railroad and the said Louisville, Cincinnati & Lexington railway and properties, and has made all the earnings men-
433 tioned and proved in the reports of the several commissioners in this case and ascertained and adjudged in the several judgments of this court and finally adjudged in the opinion and judgment of the court of appeals herein; all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati & Lexington Railway Company.

Affiant further states that the Louisville & Nashville Railroad Company, at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati & Lexington Railway Company, actually knew all the provisions of the lease, mortgages, and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties therein referred to, in accordance with said lease, mortgages, and contracts, from the time of its said purchase until the 1st day of June, 1883, and knew at all said times, including the time during which this action has been pending, that it had operated said railroad and all the other property of said Louisville, Cincinnati & Lexington Railway Company and of the Northern division of the Cumberland and Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation of the railroad and properties of the Louisville, Cincinnati & Lexington Railway Company and the Northern division of the Cumberland & Ohio
434 Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati & Lexington Railway Company, and filed all other papers which were filed herein on

behalf of the defence, and itself employed counsel in this case to make defence in the name of the Louisville, Cincinnati & Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defense of this action, and has been in court defending this action and has controlled the defense thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the — day of ——, 1885, and from the time the said Louisville & Nashville Railroad Company caused the answer to said petition to be filed herein on the — day of ——, 1886.

Affiant states that he did not know and was not informed until the response was filed hereon on the 25th day of June, 1894, of the control which the said Louisville & Nashville Railroad Company had of the property of the said Louisville, Cincinnati & Lexington Railway Company and the Northern division of the Cumberland & Ohio Railroad Company.

Affiant further states that it was the intention of the plaintiffs to sue the company or companies controlling and operating the railroads and properties of the Louisville, Cincinnati & Lexington Railway Company and the Northern division of the Cumberland & Ohio Railroad Company, and which made the earnings aforesaid exhibited as aforesaid in defence of this action.

ADOLPH L. SCHMIDT.

435 Subscribed and sworn to before me by Adolph L. Schmidt this 24th day of June, 1896. My commission expires January 27th, 1900.

J. V. CORLEY,
Notary Public, Jefferson Co., Ky.

At a court held on the 3rd day of October, 1896—

The court, being now advised, delivered a written opinion, which is ordered to be, and is now, filed herein.

Said opinion is as follows, to wit:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, Trustee, etc., Plaintiff,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY, etc., Defendants. } Opinion.

This case is submitted on a motion by the plaintiff, A. L. Schmidt trustee for the bondholders, for a rule against the Louisville & Nashville Railroad Company to compel it to pay into court the sum of $53,565.62 and to refer this case to the commissioner to ascertain the net earnings of the road of the defendant, The Louisville, Cincinnati & Lexington Railroad Company, on business coming to it from the Northern division of the Cumberland & Ohio railroad since the time of the last net earnings reported in the report in this case *No.* R. E. S. No. 2, together with interest thereon from the time

said earnings should have been applied in payment of the
436 interest on the bonds, as provided in the contract sued on and as prayed for in the petition.

This motion is based upon the affidavit of Adolph L. Schmidt, trustee for the bondholders of the Northern division of the Cumberland & Ohio railroad, filed in this case on the 27th of June, 1896, taken in connection with the record in this case. As appears from said record and the said affidavit, this suit was instituted & has been and is prosecuted by Adolph L. Schmidt, the plaintiff, individually and as trustee for the bondholders of the Northern division of the Cumberland & Ohio railroad, and Jacob Peter, James McCarty, George H. Reed, P. Booker Reed, Eliza Reed, W. P. Reamer, and others, for themselves and for others, owners of said bonds, against the Louisville, Cincinnati & Lexington Railway Co. upon the covenants of a lease contract executed in 1879 by and between the Louisville, Cincinnati & Lexington Railway Co. on the one part and the Northern division of the Cumberland & Ohio Railroad Company on the other. The covenant of said lease sued on in this action and which is the gravamen of this suit is that provision in said lease contract of 1879 between the Louisville, Cincinnati & Lexington Railroad Co., lessee, and the Northern division of the Cumberland & Ohio Railroad Co., lessor, in regard to an unfinished line of railroad from Bloomfield to Shelbyville, in the State of Kentucky, in which it was provided that the lessee, the Louisville, Cincinnati & Lexington Railroad Co., would in a certain event (which might or might not happen) pledge the net earnings
437 (which might or might not accrue to it, the said Louisville, Cincinnati & Lexington Railroad Co.) from or by reason of business coming to it, the said Louisville, Cincinnati & Lexington Railroad Company, from or over said lines of the Northern division of the Cumberland & Ohio Railroad Co. to secure the payment of interest on the mortgage bonds executed by the said lessor, the Northern division of the Cumberland & Ohio Railroad Co.

In the lease contract there is a provision that the said lease thus made and executed by the Northern division of the Cumberland & Ohio Railroad Co. to the Louisville, Cincinnati & Lexington Railroad Company should not be assigned without the consent of the said lessor.

Two years after the execution of this said lease contract between the Louisville, Cincinnati & Lexington Railroad Co., the lessee, and the Northern division of the Cumberland & Ohio Railroad Co., the lessor, to wit, in 1881, the lessee, the Louisville, Cincinnati & Lexington Railroad Co., sold its property and franchises, except the corporate franchise to exist, to the Louisville & Nashville Railroad Co. The corporate franchise of the Louisville, Cincinnati & Lexington Railroad Co., giving it corporate existence as a corporation, was not sold, and the corporate organization created by its charter, to wit, the Louisville, Cincinnati & Lexington Railroad Co., has been kept up and still exists as a distinct artificial, corporate person.

In this contract of sale by the Louisville, Cincinnati & Lexington

Railroad Co. to the Louisville & Nashville Railroad Co.,
438 executed in 1881, of all its property, it appears that it was intended and contemplated by the parties that there should be and was by virtue of said contract of sale an assignment of the said lease contract of 1879 between the said Louisville, Cincinnati & Lexington Railroad Co., lessee, and the Northern division of the Cumberland & Ohio Railroad Co., lessor. The lessor, the Northern division of the Cumberland & Ohio railroad, it appears from the record, was requested to consent to the said assignment of the lease by the Louisville, Cincinnati & Lexington Railroad Co. to the Louisville & Nashville Railroad Co.; but the said lessor, the Northern division of the Cumberland & Ohio Railroad Co., withheld its assent, and has never consented to the same. However, the Louisville & Nashville Railroad Co., under the contract of sale executed in 1881 by the Louisville, Cincinnati & Lexington Railroad Co. to it, has operated the said road up to this date.

Four years after the purchase by the Louisville & Nashville Railroad Co. of the said property of the Louisville, Cincinnati & Lexington Railroad Co., to wit, in 1895, Adolph L. Schmidt, individually and as trustee for the bondholders of the Northern division of the Cumberland & Ohio Railroad Co. and others, instituted this suit against the Louisville, Cincinnati & Lexington Railway Co., the lessee on the lease contract executed by it, and in this action sought to establish a record liability by judgment on that company, growing out of its said lease contract with the Northern division of the Cumberland & Ohio Railroad Co., the lessor. The lessor, the Northern division of the Cumberland & Ohio Railroad Co.,
439 had withheld its consent to the assignment of the lease by the Louisville, Cincinnati & Lexington Railroad Co., the lessee, to the Louisville & Nashville Railroad Co., and the gravamen of this suit was the breach of the covenants contained in the lease contract by the Louisville, Cincinnati & Lexington Railroad Co. with the Northern division of the Cumberland & Ohio Railroad Co. This suit by A. L. Schmidt, trustee, and others against the Louisville, Cincinnati & Lexington Railroad Co. was prosecuted to a final judgment against the Louisville, Cincinnati & Lexington Railroad Co., and the liability, personal and *in rem*, of the said Louisville, Cincinnati & Lexington Railroad Co. for the breach of said contract fully established by the judgment rendered in said case.

The parties to the lease contract sued on were the only parties to this suit for the breach thereof, and the said suit sought to establish the personal liability of the Louisville, Cincinnati and Lexington Railway Co. for the breach of said contract, and it further sought an enforcement of the lien provided in said contract to secure the payment of said liability. This latter *in rem* proceeding to enforce the lien was upon that provision of the contract of lease of 1879 by the Louisville, Cincinnati & Lexington Railway Co. with the Northern division of the Cumberland & Ohio Railroad Co., the lessor, wherein the said lessee, the Louisville, Cincinnati & Lexington Railway Co., pledged and created a lien upon the net earn-
440 ings, or so much thereof as might be needed, which might accrue to it, the said Louisville, Cincinnati & Lexington Rail-

way Co., by reason of business coming to it from or over the said railroad lines of the said Northern division of the Cumberland & Ohio Railroad Co., lessor, for the payment of the said interest on said bonds.

Thus, in the said lease contract by the Louisville, Cincinnati & Lexington Railroad Co., lessee, with the Northern division of the Cumberland & Ohio Railroad Co., lessor, of the railroad lines of the latter company, the said lessee, the Louisville, Cincinnati & Lexington Railway Co., put in lien and mortgaged all the net earnings which might accrue to it by reason of business coming to it from and over said lines of the Northern division of the Cumberland & Ohio Railroad Co. to the trustee of the bondholders for the payment of interest on said bonds.

Joshua F. Speed, now deceased, was made the trustee and mortgagee for the said bondholders. He has since died and is succeeded by Adolph L. Schmidt, the plaintiff, who is now the acting trustee in his lieu and stead.

Thus the Louisville, Cincinnati & Lexington Railway Co. by said lease indenture became and was mortgagor of all the net earnings which might accrue to it by reason of business coming to it from or over said lines of the Northern division of the Cumberland & Ohio Railroad Co., leased to the said mortgagor. This mortgage indenture embodied in the lease contract was duly acknowledged by the said mortgagee, the Louisville, Cincinnati & Lexington Railway Co., and duly recorded in the clerks' office- of the county court of the
441 counties of Spencer, Shelby, Henry, and Jefferson *counties*, in this State.

In this suit a judgment was rendered for the plaintiff, as we have seen, in this court, against the defendant, The Louisville, Cincinnati & Lexington Railway Co., personally and *in rem*, upon the said net earnings pledged by it as aforesaid, and a return made of "no property found," and a response filed by the Louisville, Cincinnati & Lexington Railway Co. to a rule issued against it to pay said net earnings into court, setting forth the fact that in 1881, four years prior to the institution of this action, by a conveyance duly recorded, it, the said defendant, The Louisville, Cincinnati & Lexington Railway Co , had sold all of its property, including said railroad, upon which and from which said earnings in lien might accrue, to the Louisville & Nashville Railroad Co., a purchaser for value. This response was held sufficient.

After said final judgment against the defendant, The Cincinnati & Lexington Railroad Company, had been entered in this suit, and after the return by the sheriff and the response filed by the defendant, a motion was made by the plaintiff to strike this response from the file and to make the said response by the defendant, The Louisville, Cincinnati & Lexington Railroad Company, more specific. This motion, being heard, was duly passed upon in this court in an opinion filed December 17th, 1894, overruling said motion. After the said final judgment had been entered against the defendant, The Louisville, Cincinnati & Lexington Railroad Com-
442 pany, and after the said motion had been overruled, to wit, on May 27th, 1895, the plaintiff tendered and moved to file an

amended and supplemental petition making the Louisville & Nashville Railroad Company a party defendant herein, and in said amended and supplemental petition seeking to make the said Louisville & Nashville Railroad Company a party to this action it prayed judgment against the said Louisville & Nashville Railroad Company for the subjection of the said earnings made on the road of the Louisville, Cincinnati & Lexington Railroad Company from the 1st day of June, 1883, until the — day of——, 1890, until all the bonds and coupons mentioned in the petition and in the amended and supplemental petition should be so paid and satisfied up to the termination of the lease mentioned as aforesaid by the Northern division of the Cumberland & Ohio Railroad Company to the Louisville, Cincinnati & Lexington Railroad Company; and it further prayed for the appointment of a receiver of the property of the Louisville, Cincinnati & Lexington Railroad Company now purchased and owned by the Louisville & Nashville Railroad Company under the said contract of 1881 between said companies, to the end that the said receiver might operate the said railroad and property and collect the said net earnings and apply the same to the payment of said bonds and coupons, in accordance with the contract between the Louisville, Cincinnati & Lexington Railroad Company and the Northern division of the Cumberland & Ohio Railroad Company, entered into in 1879.

443 This motion by the plaintiff, after the final judgment in the case against the defendant, The Louisville, Cincinnati & Lexington Railroad Company, had been entered and return made thereon by the sheriff, to file said amended and supplemental petition making the Louisville & Nashville Railroad Company a party to said action was overruled by this court upon the authority of Brown *vs.* Van Cleave, 86 Kentucky, 381, and Meadows *vs.* Goff, 90 Ky., 540. The motion to file said amended and supplemental petition was made long after a final judgment had been rendered in said suit and after this court had lost control over said judgment, and when there was no suit pending before the court in which an amended pleading could be filed. The rights of the parties had been litigated to a final judgment, and the time had elapsed in which the court had control over said judgment when the said supplemental and amended petition was tendered. The court had no power to set the judgment aside and open the pleadings for said amendment. The power of the court had been spent in the rendition of said final judgment in favor of the plaintiff against the defendant, the only parties to the suit as shown by the record, and the litigation was at an end so far as the suit was concerned.

The execution under the said judgment had been returned, which was in said suit an end of the law, and there was nothing before the court to be amended, nor room for an amended and supplemental petition. It was upon this elementary principle of pleading and judicial procedure that this court overuled the motion

444 made by the plaintiff on May 27th, 1895, to file an amended and supplemental petition.

From this order of the court overruling the said motion to file

the amended and supplemental petition the plaintiff appealed, and the court of appeals (opinion by Judge Du Relle) affirmed the judgment of this court.

The opinion of the court of appeals, rendered through Judge Du Relle, was filed in this court on the 27th day of June, 1896. In the opinion of the learned judge it is stated that the Louisville & Nashville Railroad Company, upon the facts set forth in the amended petition, which in that court was taken as true, was and is bound by the judgment against the Louisville, Cincinnati & Lexington Railroad Company. It should be observed, referring to the record in this case, that there is no pretense offered by the plaintiff that he made a mistake in suing the wrong party when he made the Louisville, Cincinnati & Lexington Railroad Co. the defendant in said action. On the contrary, it is admitted that if the Louisville & Nashville Railroad Co. had been sued upon the contract which is the gravamen of this action, upon the allegations set out in the petition, the petition would have been demurrable, and no judgment could have been rendered thereon against it. There is no pretense and can be no pretense made that the Louisville, Cincinnati & Lexington Railway Co., the lessee, sued in this action upon the covenants of its lease, was sued by the wrong name.

It is not pretended that the plaintiff intended to sue the Louisville & Nashville Railroad Co. in this suit, nor can it be
445 claimed, in the face of this record, that the Louisville & Nashville Railroad Co. was sued in this action or was or is a party to said action, or that it ever entered its appearance to said action, or that it appears anywhere in the record, from the filing of the suit to final judgment in the case, or that it had any connection or privity with the parties to this suit.

These are the radical points of differentiation between the case of Heckman *vs.* Louisville & Nashville Railroad Co., 85 Ky., 633, and the case at bar. The court of appeals, speaking through Mr. Justice Du Relle, in the original opinion affirming the judgment of this court refusing to allow the supplemental and amended petition to be filed, stated, as we have seen, that if the statements of the amendment tendered were true the Louisville & Nashville Railroad Company was bound by the judgment against the Louisville, Cincinnati & Lexington Railroad Co., and, as a logical deduction from this proposition, indicated in the opinion, that the proper procedure was either by a suit against the Louisville & Nashville Railroad Co. upon the judgment in this case rendered against the Louisville, Cincinnati & Lexington Railroad Company or by a rule against the Louisville & Nashville Railroad Company to compel it to comply with and pay and satisfy the judgment against the Louisville, Cincinnati & Lexington Railroad Co.

Near the conclusion of the opinion of the court of appeals affirming the judgment of this court overruling the motion of the
446 plaintiff to make the Louisville & Nashville Railroad Co. a party defendant to this action by a supplemental petition, the following language appears:

"But we are of the opinion that after the appeal and judgment

in this case it would be too late to bring into this litigation one (referring to the Louisville & Nashville Railroad Co.) who was neither party to the record nor bound by the judgment. In our view, the facts stated in the amended petition did not give the appellants (Adolph Schmidt and others) the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for upon the theory of that amendment, and considering the facts therein stated to be true, that company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit stating the facts set out in the amendment."

If this were all that had occurred in this action, this court would promptly sustain plaintiffs' motion in this suit for a rule against the Louisville & Nashville Railroad Co. to comply with the judgment rendered in the suit of the plaintiffs against the Louisville, Cincinnati & Lexington Railroad Co. But defendant moved for a modification of the opinion in so far as it adjudged that the
447 Louisville & Nashville Railroad Co. was a party to the said action and bound by the said judgment, upon the ground that the question as to whether the Louisville & Nashville Railroad Co. was a party to the suit and bound by the judgment was not before the court upon the appeal in which the said opinion was rendered.

The appeal was taken from the order or judgment of this court overruling the plaintiffs' motion to make the Louisville & Nashville Railroad Co. a party to the said action, on the ground that the said motion came too late, a final judgment having been entered in the said case, and the court having lost control over said judgment when the said motion to make the Louisville & Nashville Railroad Co. a party to the suit was made. There was no question raised on the motion to file the amended and supplemental petition which was overruled as to whether the Louisville & Nashville Railroad Co. was a party to the suit or was bound by the judgment. Certainly the plaintiffs knew that the Louisville & Nashville Railroad Co. was not a party to the suit and were not bound by the judgment. This fact is shown by the very motion to file the amended and supplemental petition making it a party and seeking to bind it by similar judgment to that rendered against the Louisville, Cincinnati & Lexington Railroad Co., *res ipsa loquitur*.

In the opinion of the court of appeals rendered by Judge Du Relle on the motion to modify the opinion, it is stated:

"It is also, perhaps, true that the opinion (referring to the
448 opinion holding that the Louisville & Nashville Railroad Company was a party to the suit and was bound by the judgment) went too far in stating that the questions were decided which were not strictly before the court upon the appeal."

The learned judge further states, correctly enough, that it has

been the custom of courts since opinions were written to state the existence of a remedy which was not sought as a reason for denying the remedy which was sought; and continuing he says:

"In thousands of cases it has been stated that the relief sought in equity was denied because an adequate remedy at law existed. This, however, is universally construed, and properly so, to be stated *arguendo*, and the opinion in this case should have been confined in that respect to stating as argument that the Louisville & Nashville Railroad Co. was bound by the judgment, if the matters stated in the tendered amended petition were true, and without indicating the exact course of procedure to be adopted."

This modification of the opinion leaves this court at liberty to decide upon the motion presented here, as *res integra*. It is not *res adjudicata*. And as to the question whether or not the Louisville & Nashville Railroad Co. was a party to this suit by Schmidt and others against the Louisville, Cincinnati & Lexington Railroad Co., another distinct corporation, and bound by the judgment rendered in such action, is, by the modification of the opinion herein, left as an open question, this court feels at liberty to pass upon said
449 question; and, with the very greatest diffidence and with the profoundest respect for the learning of the learned court of appeals, as indicated in what is stated in the opinion *arguendo*, this court will present its views upon the question raised by the said motion.

I may, I trust, with all proper obeisance cite in this connection a quotation from a learned and classical brief which the accomplished judge of the court of appeals who delivered the opinion in this case once filed in a case which he tried before me. In graceful apology for pointing out the "error of my ways" in the decision I had made in that case, he, with attic wit, sought to soothe the wounds of the court by reminding the court that it had been reported "*Aliquando etiam dormitat bonus Homerus.*"

The question on this motion is whether or not the Louisville & Nashville Railroad Co. is a party to this suit and is bound by the judgment rendered in the case. If it is, then the motion for the rule should be sustained; if it is not, the rule should be overruled.

In Allin's Heirs *vs.* Hall's Heirs, 1 A. K. Marshall, marginal page 525, top page 391, Judge Rowan delivered the opinion of the court. It is a case which has never been doubted, questioned, or overruled in this State or by the courts of any other State with which I am acquainted, and, it would seem, is decisive of the question at bar.

It was a suit against John Allin to enjoin the enforcement
450 of certain judgments. John Allin, the defendant, urged in bar of the plaintiffs' rights to sue the suit of Craig against Allin and wife and the decree therein; that suit of Craig against Allin and wife was shown *dehors* the record to have been instituted at the instance of the plaintiffs in the injunction suit, and to have been prosecuted with their assent and approbation; that the said suit involved the same matter and was conducted at the plaintiffs' expense and managed according to their will, and was sustained by their personal efforts, and was intended for their benefit.

Allin further urged that although Craig was the nominal plaintiff, yet they, the plaintiffs in the suit for an injunction against him, were the real complainants therein; that they were the sureties of Craig in the injunction bond, and that they all retained the possession of their lands by reason of the suit during the pendency thereof; and to further show that the appellees, who were the plaintiffs in the suit against him, were virtually and substantially the parties in the suit prosecuted by Craig, he alleged that the plaintiffs had, previous to the institution of the suit by Craig, respectively released errors in the action in ejectment as a prerequisite to the obtaining of the injunction prayed for against him.

Allin, after he had answered, died, and the suit against him was revived in the name of his heirs, and upon the trial and final hearing thereof a decree was pronounced in favor of Hall's heirs, from which an appeal was prayed and granted. The court of appeals thus states the question involved:

451 "The question first presented for the consideration of this court is the competency of the matter alleged in the answer to bar the suit of the appellees.

"There is no doubt but that the parties to a suit, either at law or in chancery, are bound by the judgement or decree pronounced therein, and are bound thereby (while it remains unreserved) from rediscussing in another suit the matters thereof, and that their privies are alike bound and barred. This principle is so intrinsically just and so obviously necessary that it has obtained the place and character of a rule of law with all the commentators upon and compilers of our laws. This decree in the case of Craig *vs.* Allin and wife purports to embrace the same matter embraced by the bill of the appellee, to have been upon the merits; and as it was final and remains unreversed, they, if they can be considered parties thereto, must, according to the rule aforesaid, be barred or bound thereby.

"To ascertain the extent of the effect of a judgement or decree in relation either to the matters thereof or parties thereto, the record of the suit in which it may be rendered or pronounced should be explored. This affords the information most, if not solely, to be relied upon in the progress of such an inquiry. The law imputes to the record absolute verity, and will not permit the matter which it imports to be gainsa*yed* or traversed. A record is defined to be

452 the history of a suit from its commencement to its conclusion, and in every stage of its progress the forms and devices of the law are admirably adapted to the superinduction of that verity which it ascribes to the record thereof in relation to the parties thereto or the matter therein. To each party there is afforded the most ample and appropriate means of extracting from the suit all the doubt and uncertainty which may exist therein in relation to the personal competency of his adversary or to the matters alleged by him.

"And hence results (as we believe) the rule that none are to be considered as parties to a suit and bound in that character by a judgement or decree therein but those who are named as such in the records thereof.

"The appellees are not named in the record of the suit of Craig *vs.* Allin and wife as parties thereto, and of course, according to the rule of law last mentioned, cannot, in that character, be bound or barred by the decree pronounced therein. Not being barred as parties to that suit, it remains to be inquired whether they are barred as privies. The most general division of privies is into those of contract, of estate, and of blood. Privity of blood is not alleged in this case. That of estate cannot be relied upon because Craig, at the time of the institution of the suit aforesaid, had no estate, interest, title, or claim in or to the land in controversy, either in law or equity. That of contract did not exist, for anterior to that time they had consummated their purchases and had in themselves the legal as well as equitable title to the land. As privies, there-
453 fore, we cannot think they are bound or barred by the decree.

"But it is alleged that they had an interest and took an agency in that suit, which ought to subject them to the decree therein as virtual, as much as if they had been express parties thereto. Any zeal which third persons may display in favor of a party to a suit or any assistance they may afford him either in money or services may subject them to the animadversion of the law as bar-itors or maintainors, or entitle them to the kind regards of the good and the virtuous, as a spirit of unjuct and oppressive litigation or the just claims of worth and indigence shall have been subserved or promoted thereby.

"But it would be a dangerous doctrine to say that those circumstances or any of the other acts which are alleged to have been done by the appellees in relation to that suit should subject them to the decree therein as virtual parties thereto. It would be substituting vague conjecture, or, at best, the erring discretion of the judge, for that record certainty which it is believed the law affords in that class of cases. Upon the criterion afforded by the law we can know certainly by an inspection of the record who were parties to the suit and we can know certainly the extent to which their interests have been settled by a judgement or decree therein, and we can know as certainly that none other than they and their privies are bound thereby. But if we can depart from the record and ascertain by proof *aliunde* who were parties to a suit other than those
454 named as such therein, may we not, with the same reason, ascertained by parol what other subjects than those specified in the bill or declaration were involved in the suit and settled by the decree or judgement; and, *e converso*, may we not ascertain by parol that a person expressly named in the record of a suit as a party thereto was only nominally and not really so, and that some of the allegations in a declaration or bill were not considered or regarded by the jury or the chancellor, and that others were only partially considered and are therefore legitimate subjects for future adjudication? If such a theory were adopted, might not justice be denied to some citizens, in violation of their constitutional right thereto, on the ground that they had been virtually parties to a suit, in the record of which they had not so appeared or been

named, and might not other citizens, on the same theory, be vexed and harrassed and have those rights which had been settled by adjudication jeopardized by rediscussion in successive suits? In fine, migh not the peace of the citizens and their dearest rights, upon such a theory, be subjected to the frailty of human memory, the weakness of human intellect, and the wickedness of the human heart? It would be unwise, we think, to adopt a theory whereby the topics upon which weakness or wickedness might act would be multiplied and the range of error enlarged. These topics are unhappily, in despite of the wisdom and caution of the law, but too numerous. The maxim of the law that 'the worn way is
455 the safe way' is, we think, wise and forbids us to look out of the record of a suit for the parties thereto.

"Being of opinion that the appellees were not bound by the suit and decree therein of Craig *v.* Allin and Wife from maintaining this action, its becomes unnecessary to examine the entry of Mallory under which they claim."

No stronger or more lucid or more logical or more forcible exposition of the law as to who are parties to a suit and who are bound by the judgement can be found in the books than the opinion of our court of appeals in the case just quoted. This case of Allin's Heirs *vs.* Hall's Heirs, in 1 A. K. Marshall, is cited as authority with approval in Memphis & St. Louis Packet Co. *vs.* Grey, in 9 Bush., 137, and is in consonance, it is believed, with all the best-considered opinions of courts and commentators upon the subject, and to the same effect is the decision of Chief Justice Marshall in De Wolf *vs.* Mallet's Administrators, 3 A. K. Marshall, 216. See also Leatherman *vs.* Times Co., 88 Ky. R., 291.

In this suit of Schmidt *vs.* The Louisville, Cincinnati & Lexington Railroad Company, in so far as it is a suit *in rem*, the *res litigiosa* or subject-matter of litigation is the net profits pledged in the mortgage and described in the petition. Before the petition in this suit by Schmidt was filed—years before the petition was filed—this subject-matter, existing only in potentiality with all other property of the Louisville, Cincinnati & Lexington Railroad Co.,
456 had been sold *bona fide* for value, by the defendant, The Louisville, Cincinnati & Lexington Railroad Co., to the Louisville & Nashville Railroad Co. The purchaser, the Louisville & Nashville Railroad Co., was not a purchaser *pendente lite*, because at the time of the purchase by it from the Louisville, Cincinnati & Lexington Railroad Co. this suit by Schmidt on behalf of the bondholders had not been instituted. It is true that the mortgage lien created by the bonds on the subject-matter existed at the time of the purchase by the Louisville & Nashville Railroad Co., and that the Louisville & Nashville Railroad Co. purchased it with notice of said lien, but no suit had been instituted to foreclose or enforce said lien at the time of said purchase. The suit by the plaintiffs to enforce said lien was afterwards instituted against the Louisville, Cincinnati & Lexington Railroad Co. The purchaser, the Louisville & Nashville Railroad Co., was not made a party co-defendant in said suit, nor was it mentioned in the caption, nor in

the body of the petition, nor in the prayer for relief, nor in the prayer for process. It was the duty of the plaintiffs to make parties to the action all persons on whom it expected the decree or judgement to be binding.

Lord Chancellor Bacon, in laying the foundation of chancery procedure, adopted certain ordinances or rules "for the better and more regular administration of justice in the chancery, to be daily observed, saving the prerogative of the court." The twelfth
457 of the ordinances or rules is in the following words:

"No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order; but where he cometh in *pendente lite* while the suit is in full prosecution and without any color of allowance or privity of the court there regularly the decree bindeth; but if there were any intimations of suit, or the court made acquainted with the conveyance, the court is to give orders upon the special matter in accordance with justice." 4 Lord Beacon's Works, 511; Beamer's Orders of Chancery, p. 7; Bennet on *Lis Pendens*, section 1 *et seq.*

This rule or ordinance promulgated by Lord Chancellor Bacon has been universally adopted as a fundamental principle of chancery practice by the chancery courts of England and of this country, both State and Federal.

Had the purchase been made by the Louisville & Nashville Railroad Company *pendente lite*, the purchaser would be subject to the judgment and bound thereby. Walker *vs.* Smallwood Amb., 677–'8; Johnson *vs.* Rankin, 2 Bibb, 184; 5 Dana, 341; Cassiday *vs.* McDaniel, 8 Ben. Monroe, 519; Daniel's Chancery Practice, 181–'2, Parties; see also page 187, note 2.

This rule of Lord Chancellor Bacon touching a *lis pendens* purchaser is derived from the civil law. By the Roman civil law it was provided that a thing concerning which there is a controversy is prohibited during the suit from being alienated.
458 *Res de qua controversia prohibimur in acrum dedicare.*

There is no statute in this State modifying this rule of chancery practice. See also 2 Randolph, 93.

In Osborn *vs.* Bank of the United States, 9 Wheaton, page 738, Chief Justice Marshall uses the following language on the subject:

"In deciding who are parties to a suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

And again, in discussing the question of jurisdiction by reason of the parties to the action, the court says:

"The bank contends that in all cases in which jurisdiction depends on the character of the party reference is made to the party on the record, not to one who may be interested, but who is not shown by the record to be a party. If this question was to be de-

termined on the authority of any decisions, it is believed that no case can be adduced where any person can be considered as a party who is not made so on the record."

Again, "In cases where a State is a party on the record, the question of jurisdiction is decided by inspection."

In the case at bar let us suppose that the Louisville
459 & Nashville Railroad Company had its habitat in another State—say in the State of Tennessee, instead of in Kentucky—would the judgment against the Louisville, Cincinnati & Lexington Railroad Company be binding upon it, and could a suit upon a certified copy of a record in which its name nowhere appears be maintained against it in any other State or Federal court? Could the Louisville & Nashville Railroad Company have appealed from the judgment against the Louisville, Cincinnati & Lexington Railroad Company upon an affidavit setting up the facts upon which this rule is asked? What undisclosed defenses the Louisville & Nashville Railroad Company may have to the plaintiffs' claim on the net earnings we know not. Cannot a state of facts be easily supposed which, put into an answer, would operate as a defense by estoppel to the plaintiffs' demand? What legal or equitable defenses it may have we know not. Should it not have its day in court before it is bound by the legal force of a judgment for $50,000 or more? Is it possible that it is concluded by an action to which it is not a party?

The case of Osborn *vs.* Bank of United States, 9th Wheaton, *supra*, is cited with approval in United States *vs.* Lee, 106 U. S., page 216. Mr. Justice Miller, after quoting from Chief Justice Marshall in Osborn *vs.* Bank of United States, states the proposition as follows:

"That the United States are not bound by a judgment to which they are not parties, and that no officer of the Government can be defending a suit against private persons—conclude the United
460 States by the judgment, was sufficient to decide that case, and was all that was decided," referring to the case of Car *vs.* United States, in 98 U. S.

It is perfectly clear from the record in the case at bar, and from the contract sued on, and from the pleadings in the case, and from the oral arguments at bar by counsel for the plaintiffs, and from the briefs filed in the case that it was never considered that the Louisville & Nashville Railroad Company was a party to this suit, nor was any relief against it prayed for in any of the plaintiffs' numerous pleadings. It is frankly admitted by the plaintiffs' learned counsel that there was no such connection between the Louisville & Nashville Railroad Company and the subject-matter of this litigation as would bind the said company by a judgment *in personam* against it in this action. It is frankly admitted that the plaintiffs had no contract whatever with the Louisville & Nashville Railroad Company, but that the contract sued on was with the Louisville, Cincinnati & Lexington Railroad Company, and not with the Louisville & Nashville Railroad Company and the record shows that the Louisville & Nashville Railroad Company is nowhere mentioned in the original or amended petition, nor in the

caption or any of them, nor in the statements or charges or inte r rogatories or prayer for relief or prayer for process. It is an equally apparent fact that the Louisville & Nashville Railroad Company was never summoned or served with process, or never appeared or entered its appearance or authorized its appearance to be
461 entered in the suit, and there is no averment anywhere in the plaintiffs' pleadings in this suit of the legal existence of the Louisville & Nashville Railroad Company. A judgment or decree is binding only on those who can appeal from it. This is a legal *axi-m* without exception, and no authority can be found sustaining the anomalous proposition that a court can directly adjudicate upon a person's rights without that person being actually or constructively before the court.

The Louisville & Nashville Railroad Company was a necessary party to this action, because it had purchased the *res litigiosa* after a lien thereon had been created; but it was not a *pendente lite* purchaser. *Quoad* the *rem* in lien sought to be subjected—that is, the net earnings spoken of in the contract mentioned in the pleadings—the Louisville & Nashville Railroad Company was a necessary, indispensable party to a suit to subject the same, because a judgment or decree enforcing the said lien cannot be made without affecting its interests therein. Of this fact it does not lie in the mouth of the plaintiff to say he had no notice, because the same was a matter of record by registry of the contract of purchase by the Louisville & Nashville Railroad Company in the county clerk's office of Jefferson county.

Mr. Tyler, in his admirable disquisition on Parties to Suit*y* in Equity, says:

"Where parties interested are out of the jurisdiction of the court it is sufficient to state the facts in the bill and to pray that
462 process may issue on their return, and if the statement be proved at the hearing their appearance will be dispensed with. But whether the court can decree in their absence depends on the nature of their interest and the manner in which it will be affected by the decree. If they are to be active in performing the decree (such is the case here), or if they have rights entirely different from those of the other parties, the court cannot in their absence decree against them. But if they are only passive objects of the decree, or their rights are merely incidental to those of the parties before the court, a complete adjudication can be made in their absence."

The Louisville & Nashville Railroad Company was not out of the reach of the process of this court nor out of its jurisdiction at the time of the institution of this suit. It was the plaintiffs' duty, if they sought to bind the Louisville & Nashville Railroad Company by the judgment, to have made it a defendant and to have prayed process against it. 2 A. K. Marshall, 497; 3 Dana, 306.

The object of the suit is shown by the allegations and the prayer of the petition. It was to obtain a personal judgment against the Louisville, Cincinnati & Lexington Railroad Company on the bonds, and to subject the net earnings described in the mortgage and in

the pleadings to their satisfaction. The corpus or *rem* out of which these profits were expected to arise had been sold to and was owned by the Louisville & Nashville Railroad Company at the time
463 of the institution of this suit, and of this fact the plaintiffs had legal knowledge. The Louisville & Nashville Railroad Company was therefore directly interested, not only in the subject, but in the object of the suit, and, according to all the authorities, was a necessary and indispensable party to the action, and it is elementary law that where there is a necessary or indispensable party to an action who is not made a party he is not bound by the judgment or decree.

In illustration of this fundamental principle of equity procedure relative to making parties in equity I shall quote from Lord Chief Baron Gilbert in his Forum Romanum, page- 157–'8:

"Where a man seeks for an account of the profits of a sale of real estate, and it appears upon the pleadings that the defendant is only a tenant for life, and consequently the tenant in tail cannot be bound by the decree, and where one legatee brings a bill against an executor, and there are many other legatees, none of which will be bound either by the decree or by an account to be taken of the proceeds of the assets, and each of these legatees may direct the account in question over again at their leisure, or where several persons are entitled as next of kin under the statute of distribution and only one of them is brought on to a hearing, or where a man is entitled to the surplus of an estate under a will, after payment of debts, and is brought on, or where the real estate is to be sold under a will and the heir-at-law is not brought on—in these and all other cases
464 where the decree cannot be made uniform, for, as on the one hand, they will decree that the defendant is not doubly vexed, he shall not be left under precarious circumstances because of the plaintiffs, who might have made proper parties, and whose fault it was that it was not done."

As the necessary incident to the general relief sought in the plaintiff's petition an account was prayed for. Indeed, an accounting was necessary in order to ascertain what were the net earnings in lien. It is a rule of chancery procedure, without an exception, that in all instances where an account is prayed it is necessary to make every person a party who has an interest which will require protection. The chief object to the plaintiffs' suit was an accounting to ascertain the net earnings. The Louisville & Nashville Railroad Company was a purchaser with notice of this lien, not a *pendente lite* purchaser, and was deeply interested in said account and was a necessary party thereto. 2 Burr. Chancery Reports, page 388; 1 Keene Reports, page 34.

In Mitford & Tyler's Pleading and Practice in Equity, page 50, it is said:

"Where different persons are interested in the account, although not in the same right, they should be joined; as, for example, heirs and personal representatives, residuary legatees and distributees, mortgages and mortgagees, and their assignes; persons receiving and holding estates in succession in virtue of their representative

character, and persons having distinct interests in the same
465 security, either jointly or successively."

In King *vs.* Martin, 2 Vesey, Lord Loughborough announced the rudimental doctrine that to bind a person interested in the subject of a suit by a decree the plaintiff must make such person a party to the suit.

To the same effect is Fenton *vs.* Hughes, 7 Vesey, by Lord Eldon. Whitworth *vs.* Davis, 7 Vesey, by Sir T. Plumer; also in Smith *vs.* Snow, Sir John Leech.

The same doctrine was announced by Lord Lyndhurst in Small *vs.* Atwood, Youngs, 458. The rule is laid down in Comyns' Digest, title "Chancery," E. 2, that all persons who are interested in the question and all concerned in the demand ought to be made parties.

I have cited these respected authorities to show the wisdom, the stability, and the long continuance of the rule requiring all persons within the jurisdiction of the court who are interested in the subject and object of the suit to be made parties, and especially in suits for an accounting. It may be admitted that in the wilderness of State and territorial reports, the United States Digest, and in the jungles of the American Encyclopedia, occasional sporadic dicta may be found holding that a person within the jurisdiction of the court and interested in the subject and object of the suit is bound by the decree or judgment therein, though not a party to the suit nor before the court nor mentioned in the records. But such dicta
466 are rather illustrative of the idiosy-crasies or momentary fancies of the individual judges who utter them than sound expositions of the ancient and well-established rules of chancery pleading and practices holding the contrary.

Nor can I imagine any exigency of administrative justice that would justify a repudiation of this ancient, universally recognized rule of equity jurisprudence.

It may be said that the net earnings which are in lien under the contract for the satisfaction of the bonds and coupons are in the possession and have been in the possession for years of the Louisville & Nashville Railroad Company, and that it should be made to disgorge them, and that it is a hardship upon the plaintiffs that they should now be put to an original suit to secure the same.

There are two answers to this: It is the plaintiffs' own fault that through all these years of litigation they did not make the Louisville & Nashville Railroad Company a party defendant herein. It has been said that hard cases in the hands of two good-natured judges make bad law. The plaintiff is not remediless. There is a logical and orderly remedial procedure for him to adopt in the pursuit and enforcement of his rights so elementary, so familiar to the profession, and so accessible to him—a regular suit in equity properly framed, with a proper prayer—that it is hardly reasonable to ask or expect this court to violate the ancient rules of chancery practice and give him a novel, short cut against the defend-
467 ant unknown to chancery practice. Affidavits should not be substituted for pleadings; defenses cannot be set up by affidavits to demands such as the plaintiffs make against the Louisville

& Nashville Railroad Company by the rules sought for. Great injustice might be done by denying to the Louisville & Nashville Railroad Company its day in court; certainly it would be a most startling and dangerous precedent to establish that the rules of pleading may be discarded and equitable relief, such as is sought for in this case, granted upon rules founded upon affidavits.

The motion by the plaintiff, it appears on a more careful examination of the record, is to file the affidavit of the plaintiff setting forth substantially the averred facts contained in the amended and supplemental petition, which this court *as* hereinbefore refused to permit to be filed, as the basis for a rule against the Louisville & Nashville Railroad Co. and for a rule on said affidavit against the said L. & N. R. R. Co. For the reasons stated in this opinion the said motion is overruled.

STERLING B. TONEY, *Judge.*

At a court held on the 8th day of October, 1896—

This cause coming on to be heard upon the motions of the plaintiffs upon the affidavit filed herein on the 27 day of June, 1896, and being argued by counsel, and the court, being advised, delivered a written opinion herein, which is filed accordingly:

468 It is ordered and adjudged that the motions of the plaintiff for a rule against said Louisville & Nashville Railroad Co. to pay into court the sum of fifty-three thousand five hundred and sixty-five dollars and sixty-two cents, with interest, and to refer this case to the commissioner for the purposes indicated in said motion, are, and each of said motions is hereby, overruled; to which said plaintiffs object and except and pray an appeal to the court of appeals, which is granted.

And on the 9th day of October, 1896, plaintiff filed the following schedule in the office of the clerk of the aforesaid court:

Louisville Law and Equity Court.

ADOLPH SCHMIDT, Trustee, Plaintiff,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILROAD COMPANY, Defendant. } Schedule.

The clerk is hereby directed to copy for appeal in this action all the record beginning with and including the proceedings had on June 27, 1896.

The record of this action prior to June 27, 1896, is now in the office of the clerk of the court of appeals, and is therefore not to be copied, but therecord subsequent to said date is now desired and ordered.

SIMRALL, BODLEY & DOOLAN,
Att'ys for Pl'ff.

469 STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court, do hereby certify that the foregoing 66 pages contain a full, true, and complete

transcript (as ordered by the schedule filed herein) in the case wherein Adolph Schmidt, trustee, &c., are plaintiffs and Louisville, Cincinnati & Lexington Railroad Company is defendant, # 1860, V. C., as the same appears of record and on file in my said office.

Witness my hand this 30th day of October, 1896.

JOHN S. CAIN,
Cl'k Jeff. Cir. Ct.

The following statement was filed with the foregoing transcript:

Statement Filed by Appellants with the Transcript.

Court of Appeals of Kentucky.

ADOLPH L. SCHMIDT, Individually and as Trustee for the Owners of Bonds of the Northern Division of the Cumberland & Ohio Railroad Company; Eliza Reed, P. B. Reed, & Duff Reed, as Executors of Leander Reed, Deceased; George L. Peter, Henry Peter, and G. W. Lewman, as Executors of Jacob Peter, Deceased; James McCarty, George H. Breed, P. Booker Reed, Jane M. Reed, and W. C. Reamer, for Themselves and Other Owners of said Bonds, Appellants,

vs.

470 LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY and The Louisville & Nashville Railroad Company, Appellees.

The appellants as aforesaid file this statement with the transcript. The names of the appellants are as shown above. The names of the appellees are as shown above. The judgment appealed from herein was rendered on the 8th day of October, 1896, and will be found on page 65 of the record herewith filed.

Appellants do not desire to have any summons issued or any warning order made.

This transcript is to be read and heard in connection with the preceding transcript in the same action now on file in the court of appeals.

SIMRALL, BODLEY & DOOLAN.
PIRTLE & TRABUE.

Afterwards at a term of said court of appeals held as aforesaid on the 17th day of November, A. D. 1896, the following order was entered:

Jefferson Cir. Ct., Law & Equity Division.

SCHMIDT, &c., Appellants,
vs.
L., C. & L. R'Y CO., &c., Appellees.

Came the appellant-, by counsel, and filed a notice and moved the court to advance this case for hearing; to which motion the appellee- objected, and the cause is submitted on the motion.

471 Afterwards, on Nov. 20, 1896, the following order was entered herein:

The court being sufficiently advised, the motion to advance the case is sustained, and it is ordered that the case be set for hearing on the first day of February, 1897.

Afterwards, on Dec'r 2, 1896, the following order was entered herein:

The court being advised, and on its own motion, it is now ordered that the order heretofore made advancing this case for argument be set aside.

Afterwards, on January 4, 1897, the following order was entered herein:

Came the appellant-, by counsel, and filed grounds and moved the court to advance this case for hearing; to which the appellee- objected and filed statements in support of the objection, and the cause is submitted on the motion.

(The grounds for motion and written objections referred to in above order are not copied.)

JAN'Y 7, 1897.

The court being sufficiently advised, it is considered that the motion to advance this cause be overruled.

Afterwards, on Feb'y 16, 1897, the following order was en-
472 tered herein:

Ordered that this cause be submitted.

Afterwards, on Jan'y 14, 1898, the following judgment was entered herein:

(Chief Justice Lewis and Judges Hazelrigg, Paynter, and Burnam sitting.)

A. L. SCHMIDT, &c., Appellants,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY, &c., Appellees.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for further proceedings, consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered the appellants recover of the appellees their costs herein expended.

473 Afterwards, on the 19th day of April, A. D. 1898, the appellees, A. L. Schmidt, &c., by counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of record in words and figures following, to wit:

1860.

STATE OF KENTUCKY, }
County of Jefferson. }

Pleas before the Honorable Sterling B. Toney, judge of the Jefferson circuit court, law & equity division, at the court-house, in the city of Louisville, county and State aforesaid.

ADOLPH L. SCHMIDT, Plaintiff,
vs.
L., C. & L. R'Y CO., &c., Defendants. } Transcript of Record.

Be it remembered that heretofore, to wit, on the 23rd day of February, 1898, the following mandate was filed in the clerk's office:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

JANUARY 14TH, 1898.

ADOLPH L. SCHMIDT, &c., Appellants,
against
LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY, &c., Appellees.

474 Appeal from a judgment of the law & equity division, Jefferson circuit court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein.

Which is ordered to be certified to said court.

A copy.
Attest: A. ADDAMS, *C. C. A.*

Issued Feb'ry 19th, 1898.

At a court held on the 5th day of March, 1898—

Came plaintiffs, by counsel, and filed the opinion of the court of appeals herein.

Came plaintiffs, by counsel, and gave notice as required by rule of court.

And thereupon moved the court to set aside the judgment in this action from which the last appeal was taken.

And to renew their motion for a rule against the said Louisville & Nashville Railroad Company requiring them to pay into court the sum of $53,565.62, as shown by the report herein of R. E. Sewell marked "R. E. S. No. 2," together with the interest on said items as they should have been applied under the contract for the payment of the interest on said bond semi-annually, which principal and interest now amounts to the sum of $90,185.97.

And also to renew their motion that the action be referred
475 to the commissioner to ascertain the net earnings on said Louisville and Nashville Railroad Company's road known as the Louisville, Cincinnati and Lexington railway on business coming to it from or over the Cumberland and Ohio road, Northern division, since the time of the last net earnings reported herein in said report "R. E. S. No. 2," together with the interest thereon from the time such net earnings should have been applied in payment of the interest on said bonds, as decided by the court of appeals herein, said net earnings to be ascertained in the same way as in report "R. E. S. No. 2," and that the said Louisville & Nashville Railroad Company be directed to produce *it* books and papers before said commissioner, and return the said commissioner the amount of said earnings since the date of the last report asherein before stated; to which defendant, Louisville & Nashville Railroad Company, object-.

And the court, being advised, sustained said motion; to which said defendant excepts.

It is therefore ordered that the judgment in this action from which the last appeal was taken be, and the same is hereby, set aside.

It is further ordered that a rule be, and is, awarded plaintiffs against the defendants, Louisville & Nashville Railroad Company, returnable March 21, 1898, to show cause, if any it has or can, why it shall not be required to pay into court the sum of $53,565.62, as shown by the report herein of R. E. Sewell marked "R. E. S.
476 No. 2," together with interest on same items as they should have been applied under the contract for the payment of interest on said bonds semi-annually, which principal and interest now amounts to the sum of $90,181.97.

And it is further ordered that this action be and is referred to the commissioner to ascertain the net earnings on said Louisville and Nashville Railroad Company's road, known as the Louisville, Cincinnati & Lexington railway, on business coming to it from and over the Cumberland & Ohio road, Northern division, since the time of the last net earnings reported herein in said report "R. E. S. No. 2," together with the interest thereon from the time such net earnings should have been applied in the payment of the interest on said bonds and decided by the court of appeals herein, said net earnings to be ascertained in the same way as in report "R. E. S. No. 2," and that the said Louisville and Nashville Railroad Company be directed to produce its books and papers before said commissioner and return to said commissioner the amount of said earnings since the date of the last report, as hereinbefore stated.

And thereupon the clerk issued a rule and one copy, which is as follows:

THE COMMONWEALTH OF KENTUCKY:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, Trustee, &c., Plaintiff,
vs.
L., C. & L. R'w'y & L. & N. R. R. Co., Defendant. } Rule. # 1860.

477 To the sheriff of Jefferson county, Greeting:

On motion of plaintiff, by attorney, a rule was awarded against Louisville and Nashville Railroad Company, returnable March 21, 1898, to show cause, if any it has or can, why it shall not be required to pay into court the sum of $53,565.62, as shown by report herein of R. E. Sewell marked "R. E. S. No. 2," together with the interest on said items, as they should have been applied under the contract for the payment of interest on said bonds semi-annually; which principal and interest now amounts to the sum of $90,181.97.

Witness John H. Page, clerk of said court, this 5th day of March, 1898.

JNO. H. PAGE, *Clerk*,
By F. T. KREMER, *D. C.*

Sheriff's return on said rule is as follows:

Executed March 8th, 1898, on Louisville & Nashville Railroad Company by delivering a copy of the within rule to M. H. Smith, president of said company, he being chief officer found in this county at the time.

H. A. BELL, *S. J. C.*,
By J. H. MOORE, *D. S.*

At a court held on the 21st day of March, 1898—

Came the Louisville & Nashville Railroad Company, by counsel, and filed a response to the rule herein.

And on motion of said company, by counsel, it is ordered that said response be and is assigned to March 23, 1898, for
478 hearing.

Said response is as follows:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, Trustee, &c., Plaintiff,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILROAD COMPANY, Defendant. } # 1860.

The Louisville & Nashville Railroad Company, for response to the rule issued against it herein to show cause why it should not be required to pay into court in this case the sum of $53,565.62, with interest thereon, amounting in all to the sum of $90,181.97, says:

1st. That it is not a party to this suit. It has not been named in any pleading in the case as a party, and there is no averment made in any pleading in the case as a party, and there is no averment made in any pleading in the case against this respondent, or that is applicable to this respondent, and no judgment or order has ever been entered in this case against this respondent, and no process has ever issued against or ever been served on this respondent.

2nd. There has never been a time from the institution of this suit up to this time when this respondent could, with propriety, have filed an answer setting up its defenses against the alleged claim of the plaintiff, and to require it now to pay into court upon
479 this rule the amount stated in the rule, or any other amount, would be to deprive this respondent of its property without due process of law, contrary to the Constitution of the United States in such cases made and provided.

If the plaintiff should be required, in the usual and orderly way, to institute a suit against this respondent to hold it liable for plaintiff's alleged claim, this respondent has and could and would present good, valid, and subsisting defenses thereto.

3rd. This respondent further shows to the court that, even if the judgment herein had been against it, it should not be obliged to pay into court the amount named in the rule. The total amount due as of the 21st of March, 1898, on the judgment against the Louisville, Cincinnati and Lexington Railway Company is not $90,181.97, as stated in the rule, but $90,053.34; but this respondent says it should not be made to pay said sum even if it should be adjudged that the judgment in this case against the Louisville, Cincinnati and Lexington Railway Company is also a judgment against this respondent, because this respondent is the owner of 250 coupons which fell due the 1st day of June, 1883, which should be paid in full, with interest thereon, amounting to $16,524.37, before any payment upon any coupons falling due subsequent to said date, to wit, June 1st, 1883; 200 of these coupons were purchased by respondent and 50 of them were detached from 50 bonds which were then owned and had for some time been owned and held by the respondent. Said coupons, with interest thereon
480 from that time, should be deducted from the amount which respondent may be required to pay into court, and there should be further deducted from said amount such proportion of the remaining sum as the coupons matured and maturing on 24 of the bonds, which are still and now held by the respondent, bears to the total number of bonds, to wit, 250. Respondent further shows that although it has sold all of the 50 bonds heretofore owned by it except the 24 named above, with the coupons attached, yet the coupons falling due June 1st, 1883, were not attached to said bonds when they were sold, and did not pass with them, but remained and still are the sole property of this respondent.

4th. Respondent says that this suit was instituted against the Louisville, Cincinnati & Lexington Railway Company upon a contract duly signed and delivered by it. The suit was filed on the 12th day of October, 1885, against the defendant there named,

although the fee-simple title to all the property and rights except its franchise of the Louisville, Cincinnati & Lexington Railway Company had been as early as the fall of 1881 conveyed to the respondent, and in said conveyance were words of assignment of the lease of the properties and franchises of the Northern division of the Cumberland and Ohio Railroad Company, but no further reference thereto, and said deed has been put to record, and its existence was fully known to the plaintiff at the date of said purchase by this respondent, as well as at the date of the institution of this
481 suit. The lease of the road and franchises of the Northern division of the Cumberland & Ohio Railroad Company expressly provided that no assignment thereof should be made except with the written consent of the lessor; and although this respondent had requested of the said Cumberland and Ohio, Northern division, its consent to said assignment, and it had refused such consent, this respondent, notwithstanding said refusal, entered upon and continued to operate said road.

The plaintiff instituted this suit against the Louisville, Cincinnati & Lexington Railway Company upon its contract because there were many questions of construction which would arise, and it was claimed that the Louisville, Cincinnati & Lexington Railway Company could not avoid its liability by assigning the lease without the consent of the lessor. It was the policy of the plaintiff to first establish, if he could, his claims against the Louisville, Cincinnati and Lexington Railway Company, and in the event he failed to realize on any judgment which he might obtain, then to sue the respondent and endeavor to hold it responsible.

The Louisville, Cincinnati & Lexington Railway Company at the time the suit was instituted was and ever since has been a distinct corporation, and has always preserved its organization.

Wherefore, having fully responded, this respondent prays that the rule herein be discharged.

HELM & BRUCE,
For Respondent.

482 Stuart R. Knott says he is the first vice-president of the Louisville & Nashville Railroad Company, and he believes the statements in the foregoing response are true. M. H. Smith, the president of said company, is now absent from the State of Kentucky.

S. R. KNOTT.

Subscribed and sworn to before me by Stuart R. Knott this 15th day of March, 1898.

E. C. TURNER,
Notary Public, Jeff. Co., Ky.

At a court held on the 23rd day of March, 1898—

Came the parties herein, and the plaintiff filed the affidavit of A. L. Schmidt, trustee, together with the opinion of the court of appeals in the case of A. L. Schmidt, trustee, *vs.* The Louisville &

Nashville Railroad Company, &c., an appeal from the judgment of the Shelby circuit court.

And refiles the affidavit heretofore made by him herein on June 27, 1896.

And moves the court to make absolute the rule herein against the Louisville & Nashville Railroad Company to pay into court the said sum of $90,181.97.

And on motion of plaintiff, by counsel, it is ordered that the said affidavit heretofore filed and the affidavit now filed and the said opinion of the court of appeals now filed herein, together with the entire record and proceedings in this action, are ordered to
483 be, and are now, read on the hearing of said rule and response thereto, filed herein on March 21, 1898, and on said motion to make said rule absolute.

And this action, having been heard in part, was laid over until March 29, 1898.

Said affidavit is as follows:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, Trustee, &c., Plaintiffs,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILway Co., &c., Defendants. } #1860. **Affidavit.**

Plaintiff herein, A. L. Schmidt, trustee, having — duly sworn, states that as to the matter set up in the fourth item of the response of the Louisville & Nashville Railroad Company to the rule herein, which response was filed herein on the 21st day of March, 1898, so far as the same relates to the conveyance, mortgage, and lease set forth therein and the assignment of said lease, this affiant says that in an action in the Shelby circuit court, State of Kentucky, a court of general jurisdiction, brought by the plaintiff herein against the Louisville & Nashville Railroad Company to compel the specific enforcement and performance of said contract and lease and the obligation thereof after the said Louisville & Nashville
484 Railroad Company had given notice of its intention to discontinue the operation of the Cumberland and Ohio railroad under said lease, the said Louisville & Nashville Railroad Company by its answer in said action set up as a defense thereto the same matters which are now set up in the fourth item of said response to said rule herein, and the said matters were in issue in said action and were tried by the said Shelby circuit court, and the judgment of the said court upon the same was in favor of the said Louisville & Nashville Railroad Company; and thereupon the plaintiff, this affiant, as trustee as aforesaid, appealed to the court of appeals of Kentucky from the said judgment in the said Shelby circuit court, and the said judgment was reversed by the court of appeals of Kentucky, and the said case was remanded to the said Shelby circuit court with a mandate from said court of appeals to it to enter a judgment in said action decreeing the specific perform-

ance of said contract and lease, and that the said Louisville & Nashville Railroad Company be required to continue to operate the said Cumberland and Ohio railroad for the benefit of the bondholders represented by this affiant as trustee, and under the mandate aforesaid a judgment has been entered in said Shelby circuit court in accordance therewith, as aforesaid.

The affiant files herewith and makes a part hereof the opinion of said court of appeals upon the appeal aforesaid as the same was published and reported in the Kentucky Law Reporter, volume 19, No. 10, from page 666 to 685, both inclusive, which opinion
485 was returned by said court of appeals on the 15th day of June, 1897. So much of said No. 10 of said Kentucky Law Reporter as is embraced by said opinion is made a part of this affidavit.

Plaintiff says that said copy of said opinion published as aforesaid in said Kentucky Law Reporter is a true copy thereof. Plaintiff will file herewith, if required, a copy of the judgment of the Shelby circuit court entered in accordance with the mandate of the court of appeals aforesaid.

Wherefore plaintiff say- that all the said matters set up in said item of said response to the rule herein have been heretofore adjudicated between said plaintiff and the said Louisville & Nashville Railroad Company and are *res adjudicata*.

As to the additional credit of $16,524.37 claimed in said response for coupons which the said Louisville & Nashville Railroad Company claims to have owned, said company has already received credit for all it was entitled to on account thereof, as will appear from the following statement:

The report so filed herein of net earnings, marked "R. E. S. No. 2" (which was affirmed in the first opinion of the court of appeals herein), showed that the net earnings to which the plaintiffs and their associate bondholders were then entitled was $60,192.27. It was then claimed by the defendants herein that they were entitled to an additional credit of $6,626.65 on account of certain coupons which they had paid off or taken up and which are the same coupons now made the basis of the additional claim set up in the response, and this claim was in part made the basis of a
486 petition for rehearing in the court of appeals of Kentucky, and the court of appeals in its response to said petition said:

"If the commissioner has computed the earnings from too early a date, it is because the coupons on the bonds for such time had already been paid; and, if so, such coupons were taken in by the railroad company and will be admitted as credits on final hearing, which meets the suggestion of error in that particular made by counsel for the appellees.

"The petition for rehearing is overruled."

Said opinion was delivered February 8th, 1894.

On return of said action this court, in pursuance of said opinion, enters an order herein on the 1st day of June, 1894, giving defendant said credit of $6,626.62, which reduced the amount allowed in said

report to $53,565.62, for which, with the interest thereon, the rule herein has been issued.

A. L. SCHMIDT.

Subscribed and sworn to before me by A. L. Schmidt this March 23, 1898. My commission expires March 11th, 1900.

B. F. WASHER,
N. P., J. Co., Ky.

Said affidavit is as follows:

Jefferson Circuit Court, Law & Equity Division.

487	ADOLPH L. SCHMIDT, Individually and as Trustee for Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company; Jacob Peter, James McCarty, George H. Breed, T. Booker Reed, Eliza Reed, W. C. Reamer, and —, for Themselves and Other Owners of said Bonds, *vs.* LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Company & Louisville & Nashville Railroad Co., Defendants.	#1860.	Affidavit.

The plaintiff and affiant, Adolph Schmidt, trustee, states that on the 28th day of July, 1897, the Northern division of the Cumberland & Ohio Railroad Company, a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, and thereby authorized to construct, maintain, and operate the railroad and property hereinafter mentioned, and by an act approved the 18th day of March, 1878, authorized to make and enter into the lease, mortgages, and agreements hereinafter mentioned, executed, acknowledged, and delivered to the Louisville, Cincinnati & Lexington Railway Company, a corporation duly created by an act of the General Assembly of the Commonwealth of Kentucky, and by the said General Assembly of the Commonwealth of Kentucky duly empowered to make and enter into the lease, contract, and mortgages hereinafter mentioned, an indenture of lease in writing, which was then and there received and accepted by said lessee, wherein the said lessor let to the said lessee all the part of the said lessor's
488 unfinished road-bed, rights of way, with improvements and appurtenances, depots and depot grounds, machinery, tools, and implements, together with all its property, rights, and franchises, including unpaid subscriptions to capital stock, deeds, and demands belonging to or in anywise appertaining to said lessor's line of railway from its intersection with said lessee's railway at the town of Eminence, Kentucky, thence southwardly through a portion of Henry county and the counties of Shelby and Spencer, and to Bloomfield, in Nelson county, all in the State of Kentucky, for the period of thirty years from the date of said lease, upon the terms and for the consideration of the mutual covenants and stipulations expressed in said lease.

In said indenture it was stipulated that the president and directors of the lessor should execute, under the direction of its stockholders, — upon all the property, rights, and franchises belonging to or in anywise appertaining to said lessor's line of road aforesaid for the security of $350,000 of mortgage coupon bonds, to run twenty years, and bearing interest at the rate of 7 per cent. per annum, payable on the 1st days of June and December in each year, to be executed by the lessor as provided in its charter and delivered to the lessee within sixty days after delivery of said lease.

In said lease the lessee stipulated that said bonds or proceeds should be used by it in the construction of said lessor's said line of railway, and for no other purpose; that should the lessee be unable
489 to dispose of $250,000 face value of said bonds, the proceeds to be in money, materials, or labor, by September 1st, 1880, said lease should terminate and the parties thereto be released and the lessee restore to the lessor all said bonds; provided that no absolute sale of any of said bonds should be made by the lessee unless nor until it could place not less than $250,000 in value thereof in money or its equivalent, and when that quantity thereof should have been disposed of by lessee it should as soon as practicable, and not later than Sep. 1st, 1880, begin the construction of said lessor's said line of railroad, and that a failure to so begin should operate to terminate said lease; that upon disposing of $250,000 of said bonds as aforesaid the contract should be binding on the parties and the line from Eminence to Bloomfield be commenced, and when begun should be pushed to completion as rapidly as possible; that no bond should be sold with past-due coupons annexed; that the line of railroad constructed should be first class; that the lessee should furnish all necessary engines and rolling stock to operate the railway at the price agreed on, but the lessor reserved the right to furnish such part thereof as it could at same compensation.

It was stipulated that the lessee should make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping road-bed in order, and the net profit arising therefrom should be applied to the payment of interest and provide for sinking fund and retire said mortgage
490 bonds; but out of the gross earnings should be first deducted annually $1,000, which should be paid to lessor with which to pay expenses of keeping up its organization, and if the net earnings should prove insufficient to pay interest and provide for sinking fund aforesaid the lessee, if all other sources of raising money of said lessor should prove insufficient, should supply the deficiency, as far as it might be done, by appropriating the net earnings, or so much as might be needed on its own lines, which might accrue by reason of business coming to it, said lessee, from or over said lessor's lines, and that such pledge and agreement should be made effectual by mortgage, properly executed, acknowledged, and recorded, and should it become necessary to use any of the net earnings on the lines of the lessee to pay said interest and sinking fund, or any part of either, then all amounts so used, as well as all moneys paid for said lessor by said lessee, should be treated as interest-bearing

debts, interest at the same rate as said mortgage bonds should bear, the debt and interest to be repaid out of said net earnings thereafter accruing to said lessor on its own lines which might be appropriated consistently with the other terms of said lease, and for all sums of money that might become due from said lessor to said lessee on this or any account a lien should be and was thereby created upon all the property, rights, and franchises of said lessor owned or to be acquired in favor of said lessee, to stand next in priority to said mortgage and bonds for $350,000 as aforesaid, but said lessee should not enforce the collection of said debts or any of them by
491 enforcement of said lien until at least eight years should have elapsed from and after the creation of the same.

It was stipulated that whenever the net earnings from the leased premises should suffice to pay the interest and sinking fund on said $350,000 of bonds or such portion thereof as might be outstanding and to repay said lessee all dues and demands when due or owing, the surplus net earnings, unless used in retiring said bonds, as provided in said mortgage, less one-tenth thereof, should be paid over to said lessor, said one-tenth of said net earnings to be retained by said lessee for its own use.

It was stipulated that said lease should not be assigned without the lessor's consent, and that during the duration the lessee should pay all taxes lawfully assessed and charge the amount to operating expenses, and should restore the leased premises to lessor in good repair at the termination of the lease unless extended by mutual consent or the lessee be prevented by unavoidable casuality, legal proceedings, or operation of law.

It was stipulated that the lessee should furnish any means necessary to complete the line from Eminence to Bloomfield which should not be derived from the sale of the bonds to be issued by the lessor, and should furnish any means necessary to pay any interest to become due on said bonds previous to completion of said line which might not be derived from the earnings of said road. Any
492 means so furnished by lessee to become a lien debt payable on the same terms as previously provided in regard to its other indebtedness against lessor.

It was stipulated that if the lessee were hindered in beginning or completing the railway by act or omission of the lessor or by legal or equitable proceedings, the period or periods of such delay should not be counted as part of the time within which the lessee was obliged to perform any act under the agreement.

Affiant further states that afterwards, to wit, on the same day, to wit, on the 28th day of July, 1879, the said lessee executed and delivered to Joshua F. Speed, as trustee, an indenture of mortgage wherein, among other things, it was provided that whereas by authority of an act of the General Assembly of the Commonwealth of Kentucky approved the 18th day of March, 1878, the mortgagor had contracted with the Northern division of the Cumberland and Ohio Railroad Company for lease, construction, and operation of the latter's railway from Eminence aforesaid through a part of Henry county and the counties of Spencer and Shelby

to Bloomfield aforesaid, said lease to continue for thirty years on the terms specified, in which it was stipulated on behalf of the lessor that if the net earnings of the leased premises should prove insufficient to pay the interest and provide the sinking fund of 350 bonds of $1,000 each, bearing interest at seven per cent. per annum, payable semi-annually on the 1st days of June and December, running twenty years from July 2nd, 1879, to be issued
493 by said lessor, and if all the sources of raising money of said lessor fail to provide for said interest and sinking fund, then the said mortgagor, Louisville, Cincinnati and Lexington Railway Company, should supply the deficiency so far as same might be done by appropriating the net earnings, or so much thereof as might be needed on its own lines, which might accrue to it by reason of business coming to it from or over the said lines of the said Northern division of the Cumberland & Ohio Railroad Company; and whereas the contract of lease had been consummated by action of the stockholders of the lessor, and it was desired to carry into effect said stipulations as to said net earnings, said mortgagor, in consideration of one dollar cash in hand paid to it by said Speed, trustee, and of the premises, thereby mortgaged and put in lien all net earnings which might accrue to it by reason of business coming to it from or over said lines of the Northern division of the Cumberland and Ohio Railroad Company to said Joshua F. Speed, as trustee aforesaid (who it was recited in said mortgage was the trustee for the mortgage made by the Northern division of the Cumberland & Ohio Railroad Company to secure said 350 bonds of $1,000 each), conditioned that if the net earnings of said leased premises should prove insufficient to pay the interest and provide for the sinking fund of said mortgaged bonds, then said mortgagor, if all other sources of raising money of said lessor should prove insufficient, would supply the deficiency so far as it might be done by appropriating and paying over promptly the net earnings, or so
494 much thereof as might be needed, on its own lines which might accrue by reason of business coming to it from or over said Northern division of the Cumberland and Ohio Railroad Company lines for the purpose of discharging said interest and sinking fund as they should severally fall due.

Said indenture or mortgage was duly acknowledged by said mortgagor, Louisville, Cincinnati and Lexington Railroad Company, before and recorded by the clerks of the county courts respectively of Spencer, Shelby, Henry, and Jefferson counties in their respective offices, and a copy of said mortgage is filed as Exhibit "C" with the petition and made a part hereof.

Affiant further states that pursuant to the terms of said lease the said lessor on or about the — day of July, 1879, delivered to the said Joshua F. Speed, trustee, a deed of mortgage which was duly acknowledged before and recorded by the clerks of the county courts of Spencer, Shelby, Henry, and Jefferson counties, in Kentucky, copy of which said mortgage is herewith filed and made a part hereof, marked "A," wherein said Northern division of the Cumber-

land and Ohio Railroad Company conveyed to said Speed, trustee, all the property, rights, and franchises of said mortgagor, including all its rights, title, and interest, free from all lien, mortgage, or claims of any kind in and to its lines of railroad from its point of intersection with the line of road with the Louisville, Cincinnati & Lexington Railway Company, in the town of Eminence aforesaid, through Henry, Shelby, and Spencer counties, and to Bloomfield, in Nelson county aforesaid, together with all the improvements, appurtenances, rights of way, lands adjacent thereto, machinery, tools, and implements, fixtures, and supplies of every description, so as to vest in the said Speed, trustee, all the right, title, and interest of the said Northern division of the Cumberland & Ohio Railroad Company in and to all the property by it owned or in which it had an interest at the date of the execution of said mortgage or thereafter to be acquired by it. Said conveyance was made to secure the payment of 350 bonds by said mortgagor issued for $1,000 each, dated July 2nd, 1879, payable 20 years after date, in each of which said mortgagor promised to pay bearer $1,000 twenty years thereafter, with interest at the rate of 7 per centum per annum, payable semi-annually. By said mortgage it was provided that all of said property so conveyed should be held by said trustee for the joint and equal security of the principal and interest of each of said bonds without regard to the time when said holders might become possessed thereof.

495

By said mortgage it was provided "that in the event of the death, resignation, failure, or refusal to act of said Speed, trustee, as aforesaid, it should and might be lawful for the Shelby circuit court, upon the application of the parties holding said bonds to the amount of $70,000 or more, to appoint a trustee or trustees in lieu and stead of said Speed, and that the trustee or trustees so appointed should thereupon succeed to and be vested with all the rights, powers, and privileges which were by said deed of mortgage conferred upon said Speed, or intended so to be."

496

Affiant states that afterward, to wit, on the — day of January, 1890, and after the delivery of said lease and both said mortgages the said Northern division of the Cumberland & Ohio railroad, as first party; the said Louisville, Cincinnati and Lexington Railway Company, as second party, and said Joshua F. Speed, trustee, as third party, made, executed, and delivered, each to the other, a certain contract in writing, wherein, among other provisions, it is recited and stipulated—

"That for and on account of the difficulties of carrying into effect the contract of the parties of the first and second parts hereto in relation to the lease, construction and operation of the said first parties' proposed line of railway from Eminence to Bloomfield, of date the 28th day of July 1879, said parties have and do hereby agree upon the following change and modification of said contract and the mortgage therein named to take effect when and as soon as this change and modification shall have been duly and properly approved by majority of the stockholders of each of said companies and fully executed and recorded in the proper offices, when to all

intents and purposes the said contract so amended and modified shall be recorded and taken as the true contract and agreement between the parties hereto:

First. Whenever said second party shall be able to dis-
497 pose of said mortgage bonds provided for in said contract and mortgage amounting at their face value to the sum of $150,000 said bonds numbered from 1 to 150, inclusive, the proceeds in money, labor, or materials, the same may be done, and then this contract as amended and in all its particulars becomes absolute and the construction of that portion of said first party's line of railway between Shelbyville and Bloomfield shall be commenced and pushed to completion as rapidly as possible; and the failure to complete said road so as to permit the safe and regular passage of trains between Shelbyville and Bloomfield within two years from the commencement of work thereon shall, at the option of said first *part-*, after six months' notice thereof, operate as a forfeiture of said lease. But no disposition of any of said bonds shall be made until not less, in amount, than $150,000 at the face value thereof numbered as aforesaid can be placed for any money or its equivalent.

Second. Not more than two hundred and fifty thousand dollars of the face value of said bonds, numbered from 1 to 250 inclusive, shall be used or disposed of in and about the construction of said railroad between Shelbyville & Bloomfield, and one hundred thousand dollars of the face value of said bonds, numbered from 251 to 350 both inclusive, shall be set apart and faithfully preserved in such manner as the board of directors of the first and second parties may agree, for the ultimate construction of said first party's road between Eminence and Shelbyville; but said second party shall

not be bound to begin the construction or operation of said last-
498 named portion of said railroad until in the judgment of the board of the said second party, the operation of the same would result in sufficient earnings to pay operating expenses and interest and sinking fund on the amount required to complete the same. And the mortgage heretofore made to Joshua F. Speed, trustee therein, is hereby so modified that the said two hundred and fifty bonds to be used in constructing said railroad between Shelbyville and Bloomfield shall constitute no lien on that part of said company's road between Eminence and Shelbyville until said one hundred bonds set apart for its construction shall have been used for that purpose, and then all of said bonds issued shall be a joint and equal lien on the whole property as set out in the original mortgage and the said Speed as trustee, is made a third party hereto and shall sign this contract as evidence of his consent to the modification in this respect of the said mortgage, it being agreed and understood that at this date none of said mortgage bonds have been sold or disposed of, but remain in the hands of said second party, provided that unless the second party shall complete the construction of so much of said party's road as lies between Shelbyville and Eminence within five years from the first of September, 1880, then the lease of said last-named part of said road shall determine and terminate at the option of

said first party after six months' notice, and in the event of such termination of the lease said bonds numbered from 251 to 350 both inclusive aforesaid and the coupons thereof shall at once
499 be cancelled so as to prevent their circulation, or if the board of the parties aforesaid so order it, they shall be destroyed.

Third. Before any of said bonds numbered from 1 to 250, both inclusive, shall be sold or disposed of, each shall have a printed or lithographed endorsement thereon to the effect that none of them or their coupons have any lien upon the company's property or franchise or line of road north of Shelbyville until the one hundred bonds aforesaid are issued or used, and that portion of said road between Shelbyville and Eminence shall have been completed, and then all of said bonds and coupons shall have a common and joint lien on the whole property.

Fourth. The board of directors of the first and second parties may agree to use second-hand*ed* rails in building said road, or any part of it, said rails to be sufficient for the safe transmission of trains and to be removed and replaced as fast as they became unsafe. The price of said second-hand*ed* rails to be agreed upon by said boards before being used.

Fifth. In all respect- in which this contract is inconsistent with the original contract or mortgage said originals are abrogated and the contract as modified and amended by this agreement shall be taken as the true existing contract between the parties."

A copy of said contract is filed herewith and made a part hereof, marked "D." It was signed and acknowledged by said Northern division of the Cumberland and Ohio Railroad Company and Joshua F. Speed before and recorded by the clerks of the county
500 courts of Spencer, Shelby, Henry, and Jefferson counties aforesaid; and the modifications mentioned therein of the contract between said Northern division of the Cumberland and Ohio Railway Company and Louisville, Cincinnati & Lexington Railway Company were duly and properly approved by a majority of the stockholders of each of said companies in meetings duly called and assembled.

Affiant states that in accordance with the provision- of said mortgages, lease, and contract said bonds and coupons were prepared, signed, and countersigned and made ready for use as in the charter of said Northern division of the Cumberland and Ohio Railroad Company and said mortgage of date July 2nd, 1879, provided, and 250 bonds of $1,000 each were issued and delivered to said lessee within sixty days after the delivery of said deed of lease, in each of which bonds it is provided:

"The Northern division of the Cumberland and Ohio Railroad Company hereby promises to pay Joshua F. Speed, trustee, or bearer, the sum of one thousand dollars, on the 2nd day of July, 1899, at the Bank of America, in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable at the same place on the first day of June and December of each year, as per coupons annexed, on presentation of said coupons. This is one of the series of three hundred and fifty bonds, numbered from 1 to 350

both inclusive, and lettered A, and is secured by mortgage dated the 2nd day of July, 1879, made, executed and delivered by said
501 Northern division of the Cumberland and Ohio Railroad Company to Joshua F. Speed, as trustee, in pursuance of an act of the General Assembly, approved the 18th day of March, 1878. The holder of this bond, together with the holders of the others of said series, is entitled to the first lien for the equal security of principal and interest of each respectively on all the property rights, and franchises of said Northern division of the Cumberland and Ohio Railroad Company, as also a first lien on the net earnings of the Louisville, Cincinnati and Lexington Railway Company, duly pledged thereto, which may accrue to it by reason of business coming to it over the line of the mortgagor," the said Northern division of the Cumberland and Ohio Railway Company.

Attached to all said bonds were coupons providing for the semi-annual payment of interest on the respective bonds as aforesaid. Affiant states that before the 1st day of September, 1880, said lessee disposed of so many of said bonds numbered from one to 250, both inclusive, as amounted at their face value to $250,000, the proceeds being money, materials, and labor, and so notified the president of said lessor in writing. Said lessee for value sold and transferred said 250 bonds to divers persons upon the bond market, and the plaintiff- and many other persons unknown to plaintiffs became the purchasers thereof and are the owners and holders of said bonds, aggregating many thousands of dollars, as stated in the petition.

502 Affiant states that none of the interest on the coupons attached to said bonds which became due on and after December 1st, 1883, has been paid to any of the plaintiffs, and they are informed and believe and aver that no such payment has been made to any other owner of said bonds or coupons; that they demanded of said lessee payment of said accrued interest, but payment was refused by said lessee, which denied any liability to pay said bonds or any of them, and said lessor has likewise refused such payment.

Affiant is informed and believes and states that net earnings of said Northern division of the Cumberland and Ohio Railroad Company came into the treasury of said lessee which had never been applied to the payment of the unpaid and accrued interest aforesaid.

Affiant further states that afterward, to wit, on the — day of ——, 18—, Joshua F. Speed died, and Shelby circuit court, upon application which was made to it by the holders of the aforesaid bonds to the amount of more than $70,000 to appoint a trustee in lieu of said Speed in the mortgages and contracts aforesaid, *the said Shelby circuit court*, by order, duly entered, duly appointed plaintiff Adolph Schmidt such trustee to succeed to and be vested with all the rights, powers, and privileges which were by the said deeds of mortgage and other contracts conferred upon the said Speed, or intended so to be.

Affiant further states that all the sources of the said Northern division of the Cumberland and Ohio Railroad Company of raising

money failed to provide for the said interest and sinking fund
503 provided for in the mortgage aforesaid and failed to provide any part of said interest or sinking fund payment, and that it became and is necessary that the amounts thereof should be provided and supplied by appropriating the net earnings of the said Louisville, Cincinnati and Lexington railway and properties accruing to said railroad and properties by reason of business coming to it from or over the said lines of the Northern division of the Cumberland and Ohio Railroad Company.

Affiant further states that after the execution of said lease and the execution of the mortgage aforesaid made by said lessee of the net earnings aforesaid which — might make on business coming to it from and over the Northern division of the Cumberland and Ohio railroad, more fully stated in the petition in this action (now amended), the Louisville & Nashville Railroad Company, which *it* at all the times mentioned had notice of the said mortgage and actual knowledge of its contents, on or before the 1st day of November, 1881, by a certain deed bearing said date and recorded in the office of the clerk of the county court of Jefferson county, State of Kentucky, in Deed Book 245, page 1, purchased and received and accepted a conveyance from said Louisville, Cincinnati and Lexington Railway Company of the railroad of the grantor extending from the city of Louisville, in the State of Kentucky, to the city of Lexington, in said State, and from the junction with said railroad at Lagrange, a point about 27 miles from Louisville aforesaid, to the city of Newport, in said State, together
504 with all depots, real estate, rolling stock, and other property of said grantor, and the franchises of said grantor to operate the said railroad and take the tolls and earnings thereof.

Affiant states that in and by said deed of conveyance said grantor assigned and transferred to said grantee, the Louisville & Nashville Railroad Company, the aforesaid lease, made, as aforesaid, to said grantor by said Northern division of the Cumberland and Ohio Railroad Company on the 28th day of July, 1879, together with all the obligations thereof, and said Louisville & Nashville Railroad Company accepted the assignment and transfer of said lease and therein and thereby assumed to perform the obligations thereof.

Affiant states that prior thereto the said Louisville & Nashville Railroad Company had purchased and acquired and at the time of said conveyance held the capital stock of the said Louisville, Cincinnati & Lexington Railway Company, and as such stockholders took and appropriated and has ever since enjoyed the whole purchase price of the Louisville, Cincinnati & Lexington Railway Company and all its said properties.

Affiant states that after the execution of said deed of November 1st, 1881, said Louisville & Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati & Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern division of the Cumber-

land & Ohio Railroad Company aforesaid, and began to
505 operate and has ever since operated said railroads and properties and taken and appropriated to its own use the earnings thereof.

Affiant states that at all times since November 1st, 1881, said Louisville & Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by virtue thereof, has operated the said Northern division of the Cumberland and Ohio railroad and the said Louisville, Cincinnati & Lexington railway and properties, and has made all the earnings mentioned and proved in the reports of the several commissioners in this case and ascertained and adjudged in the several judgments of this court and finally adjudged in the opinion and judgment of the court of appeals herein; all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati & Lexington Railway Company.

Affiant further states that the Louisville & Nashville Railroad Company, at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati and Lexington Railway Company, actually knew all the provisions of the lease, mortgages, and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties therein referred to, in accordance with said lease, mortgages, and contracts, *and* from the time of said purchase until the 1st day of June,
1883, and knew at all said times, including the time during
506 which this action has been pending, that it had operated said railroad and all the other property of said Louisville, Cincinnati & Lexington Railway Company and of the Northern division of the Cumberland & Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation of the railroad and the properties of the Louisville, Cincinnati and Lexington Railway Company and the Northern division of the Cumberland and Ohio Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati & Lexington Railway Company, and filed all other papers which were filed herein on behalf of the defense, and itself employed counsel in this case to make defence in the name of the Louisville, Cincinnati & Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defense of this action, and has been in court defending this action and has controlled the defense thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the — day of ——, 1885, and from the time the said Louisville & Nashville Railroad Company caused the answer to said petition to be filed herein on the — day of ——, 1886.

Affiant states that he did not know and was not informed until the response was filed hereon on the 27th day of June, 1894, of the

control which the said Louisville & Nashville Railroad Com-
507 pany had of the property of the said Louisville, Cincinnati & Lexington Railway Company and the Northern division of the Cumberland and Ohio Railroad Company.

Affiant further states that it was the intention of the plaintiffs to sue the company or companies controlling and operating the railroads and properties of the Louisville, Cincinnati & Lexington Railway Company and the Northern division of the Cumberland and Ohio Railroad Company, and which made the earnings aforesaid exhibited as aforesaid in defense of this action.

ADOLPH L. SCHMIDT.

Subscribed and sworn to before me by Adolph L. Schmidt this 24th day of June, 1896. My commission expires January 27th, 1900.

I. V. CORLEY,
Notary Public, Jefferson Co., Ky.

At a court held on the 29th day of March, 1898—

This action coming on to be heard on response of the Louisville & Nashville Railroad Company to the rule herein and on motion of plaintiff to make rule absolute against the Louisville & Nashville Railroad Company, and said motion having been heard, was submitted, and the court, not being advised, takes time.

At a court held on the 2nd day of April, 1898—

This action having been heard on the rule issued herein against the Louisville & Nashville Railroad Company to show cause why it should not pay into court the amount of judgment herein,
508 and upon response of the Louisville and Nashville Railroad Company to said rule and upon the affidavits filed herein by plaintiff and upon the entire record and proceedings in this action, which have been heretofore ordered to be and are nor read upon this hearing, and the court, being advised, delivered a written opinion herein, which is now filed and made part of the record herein.

And it is adjudged and ordered that the said response to the said rule is insufficient, and the said rule is made absolute and the said Louisville & Nashville Railroad Company is ordered to pay into court the amount of judgment herein, the said sum of $90,053.34 as of March 21, 1898, subject, however, to the following credits, to wit:

In place of the additional credit of $16,524.37 for 250 coupons claimed by defendant in its response, it appearing to the court and being conceded of record by the parties hereto that — the said amount claimed as a credit on account of said 250 coupons which fell due June 1st, 1883, the sum of $6,626.65 has been heretofore credited to the defendant as of the said 1st day of June, 1883, leaving a balance on account of said coupons of $4,008.57, which sum is now allowed to the defendant as an additional credit upon the judgment herein, subject, however, to the reservation hereinafter provided.

The claim of the said defendant to allow it to retain its proportion

of the amount now ordered to be paid into court herein on twenty-four (24) — owned by the said defendant, to wit, the sum of $8,260.32, is also allowed, subject to the reservation hereinafter provided.

509 But the allowance of the said credit on account of the said 250 coupons and on account of the 24 bonds shall not be taken and held as an adjudication by the court herein that the said Louisville & Nashville Railroad Company as beneficiary under the trust held by the plaintiff is exempt from or liable for any part or proportion of the charges and expenses of the plaintiff trustee and of said trust.

If it shall hereafter appear upon the distribution of the fund herein that said coupons should not have been paid in full, but should have been paid *pro rata* with other coupons, or that the amount allowed the Louisville — Nashville Railroad Company on said 24 bonds is more than the *pro rata* share of said bonds, then the amount of excessive payment made upon said coupons or upon said bonds shall be adjusted in the distribution of the fund herein, whenever the same shall be made, so as to equalize the beneficiaries under the said trust with the said Louisville & Nashville Railroad Company as the owner of the 250 coupons and said 24 bonds.

After allowing the credit aforesaid the balance due upon said judgment is the sum of $77,784.45, and the said Louisville & Nashville Railroad Company is adjudged and ordered to pay the said sum into court on the 7th day of April, 1898.

To the ruling of the court in holding the response insufficient the Louisville & Nashville Railroad Company excepts.

And from this judgment the said Louisville & Nashville
510 Railroad Company prays an appeal to the court of appeals, which is granted.

Said opinion is as follows:

Jefferson Circuit Court, Law & Equity Division.

A. L. SCHMIDT, &c., Plaintiff-,
vs.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY, etc., Defendants. } Opinion.

This cause is submitted on the sufficiency of the response of the Louisville & Nashville Railroad Company to a rule *nisi* to show cause, if any it has or can, why it should not be ordered and adjudged to pay into court the amount of the judgment rendered by this court in favor of the plaintiff-, A. L. Schmidt, trustee, *et al.*, against The Louisville, Cincinnati & Lexington Railway Company, in the suit No. 1860, in this court, styled A. L. Schmidt, indiciduallv and as trustee for the bondholders of the Northern division of the Cumberland and Ohio Railway Company, *et al. vs.* The Louisville, Cincinnati & Lexington Railway Company.

The Louisville & Nashville Railroad Company has responded to the rule; in its response sets up the fact that it was not a party defendant or otherwise in the suit of A. L. Schmidt, trustee, &c., *vs.*

The Louisville, Cincinnati & Lexington Railway Company,
511 in which said judgment was rendered; that there are no allegations in the petition of said suit showing any claim by or equity in favor of the plaintiff against it, and that in said suit there was no prayer for relief, general or special, against it; that it, the respondent, is not mentioned in said suit in any of the pleadings or exhibits or proof; that it never was served with process, either actual or constructive, and never voluntarily or otherwise appeared in said suit, and that therefore it never had its day in court in said suit, and that as to it, the said respondent, there never has been an issue of any kind, by pleadings or otherwise, passed between it and the plaintiff, and that it has never had a trial on the question of its liability, and that to enforce against it the said judgment by affidavit and rule would be to deprive it of its property without due process of law. This is the response, epitomized and reduced to a syllabus.

Heretofore in this case, prior to the 3rd of October, 1896, but after the judgment in this case had been rendered in favor of plaintiff against the defendant The Lousiville, Cincinnati & Lexington Railroad Company, there was a motion by the plaintiff to file an amended petition against the respondent The Louisville & Nashville Railroad Company to relitigate the whole matter with it. This court refused to allow the said amended petition to be filed upon the grounds that there had been a final judgment rendered in the said action in favor of the plaintiff, A. L. Schmidt, &c., against the only defendant in said action, to wit, The Louisville,
512 Cincinnati & Lexington Railway Company, and that it was too late after the court had lost the control over said judgment for the lapse of sixty days from its rendition to relitigate by amended pleadings and new parties the issue which had been settled by said judgment. From said judgment an- order by this court an appeal was taken to the court of appeals, and the said order or judgment refusing to allow the amended petition to be filed under the circumstances was affirmed. On the return of the case to this court the plaintiff then moved to file an affidavit, and upon said affidavit to have a rule, such as we are now considering, issued against the respondent The Louisville & Nashville Railroad Company, a stranger to the action, to show cause why it should not be adjudged, ordered, or compelled to satisfy said judgment; and this court on the 3rd of October, 1896, overruled the said motion and refused to allow the affidavit to be filed and the said rule to go, and this court filed an opinion in this said case, setting forth at length the principles of law and the authorities upon which this court based its action. In that opinion, upon a full view of all the authorities, this court held that a person—a stranger to the action, not a party to the suit—over whom the record shows that the court rendering a judgment in said suit had no jurisdiction, either by voluntary appearance or by service, actual or constructive, could not be compelled in a summary proceeding by affidavit and rule to satisfy said judgment; that the private rights of a citizen, whether *in rem*
513 or *in personam*, could not be enforced or destroyed by a judgment in an action in a case in which the party sought to be

bound by said judgment had never had his day in court; that to fix a personal liability on a citizen and enforce it by such an *ex parte* procedure would be to violate the established rules and principles and settled usages and modes of judicial procedure of the common law and to deprive the citizen of his property without due process of law; that it would be not only against the spirit of the common law but also in violation of the fourteenth amendment to the Federal Constitution, which inhibits the deprivation of any person of life, liberty, or property without due process of law. This court held in said opinion, reviewing the English and American authorities *in extenso*, that there could not be a coercive final judicial determination of the private rights of a citizen by a judgment in an action where such citizen was not a party to the suit, and when the record showed that his very name and existence nowhere appeared in said action. This court held that the procedure and principles of law in courts of common law and chancery, from the establishment of *aula regis* to the present day, required that a person be heard before he was condemned or deprived of his property, and that a judgment against him could only be rendered after trial; that such was the regular orderly method of procedure, which constituted due process of law in England and in this country, and especially in this State, as announced in the able opinion of our court of appeals in Allin's Heirs *vs.* Hall's Heirs, 1 A. K. Marshall, 525,
514 and also by Mr. Justice Harlan, in the case of the Chicago, Burlington, &c., Railroad Company *vs.* Chicago, 166 U. S., 226. An appeal was prosecuted by plaintiff from the order of this court refusing to allow the said affidavit to be filed and the said rule to issue, and the ruling of this court was reversed by the court of appeals. The mandate of the court of appeals and the opinion of the learned judge who delivered said opinion were filed herein on March 5th, 1895. In that opinion and judgment of the court of appeals it is adjudged that this court erred in refusing to allow said affidavit to be filed and in refusing to issue the rule against the said Louisville & Nashville Railroad Company, respondent herein, to compel it to pay the said money adjudged against the defendant The L., C. & L. R'y Co. into court. The learned court uses the following language:

"After a careful consideration of this question, it seems to us that the question whether the L. & N. R. R. Co. has had its day in court in this suit can be as well determined in this suit as in another. If the L. & N. R. R. Co. is a party to this suit, it is so because it has, as assignee of the contract and owner of the property of the L., C. & L. R'y Co., obtained the net earnings and conducted the defense of this suit, and the truth of these averments can be ascertained upon rule and response and the payment of the earnings received be compelled as the production of mortgaged property might be compelled in ordinary proceedings to enforce liens. * * *

It is sufficient to say in passing upon the sufficiency of the
515 affidavit, as it would be in passing upon the sufficiency of a petition, that if the facts stated are true the L. & N. R. R. Co. may be compelled to pay over the net earnings which it has re-

ceived. On the other hand, if the averments of the affidavit are not true, as counsel strenuously insist, the L. & N. R. R. Co. cannot be hurt, for the truth can be made to appear, and if that party is not the real party to the suit, it is not bound by the judgment."

Continuing, the learned court used the following language:

"Much stress is laid upon the case of Allin *v.* Hall (1 Marshall, 525), as holding that only parties to a suit, or their privies, are barred by a judgment herein. While under the facts of that case it may well be doubted if the same conclusion would be reached to-day, in the light of the latter doctrine no one disputes the correctness of the general rule there stated."

It is the province of this court to yield implicit, respectful, and prompt obedience to the mandate of the supreme appellate court of this State, and in so doing to hold the respondent The Louisville & Nashville Company bound by the judgment in an action in which it was not a party to record nor a privy to any of the parties to the record.

It follows, therefore, and this court, in accordance with the opinion rendered by the court of appeals in the case "in the light of the latter doctrine," holds and adjudges that the response of The Louisville & Nashville Railroad Co., respondent herein, is insufficient in law, and that it be and it is hereby ordered and adjudged to
516 pay into court, after allowing it due and proper credit-, which are set forth in the order which I have prepared and handed to the clerk, the balance due upon said judgment, to wit, the sum of $77,784.45, and the said payment into court by the said Louisville & Nashville R. R. Co. is ordered to be made within five days from this date.

STERLING B. TONEY, *Judge.*

And on the 4th day of April, 1898, came the Louisville & Nashville R. R. Co. and executed and filed a supersedeas bond in the clerk's office, which is as follows:

COMMONWEALTH OF KENTUCKY, }
Jefferson County. }

Jefferson Circuit Court.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant, }
against } No. 1860.
A. L. SCHMIDT, Trustee, Appellee. }

Appeal from a judgment of this court rendered the 2nd day of April, 1898.

Whereas said appellant has taken an appeal from the judgment of this court rendered on the 2nd day of April, 1898, against Louisville & Nashville Railroad Company in favor of appellee, A. L. Schmidt, trustee, &c., for the sum of ($77,784.45) ——, which judgment is in words and figures as follows:

This action having been heard on the rule issued herein against

the Louisville & Nashville Railroad Company to show cause
517 why it should pay into court the amount of judgment herein, and upon response of the Louisville & Nashville Railroad Company to said rule, and upon the affidavits filed herein by plaintiffs, and upon the entire record and proceedings of this action, which have been heretofore ordered to be and are now read upon this hearing, and the court, being advised, delivered a written opinion herein, which is filed and made part of the record, and it is adjudged and ordered that the said response to the said rule is insufficient, and the said rule is made absolute, and the said Louisville & Nashville Railroad Company is ordered to pay into court the amount of judgment herein, the said sum of $90,053.34, as of March 21, 1898, subject, however, to the following credits, to wit:

In place of the additional credit of $16,524.37 for 250 coupons claimed by defendant in its response, it appearing to the court and being conceded of record by the parties hereto that of the said amount claimed as a credit on account of said 250 coupons which fell due June 1st, 1883, the sum of $6,626.65 has been heretofore credited to the defendant as of said 1st day of June, 1883, leaving a balance on account of said coupons of $4,008.57, which sum is now allowed to the defendant as an additional credit upon the judgment herein, subject, however, to the reservation hereinafter provided.

The claim of the said defendant to allow it to retain its proportion of the amount now ordered to be paid into court herein
518 on twenty-four (24) bonds owned by the said defendant, to wit, the sum of $8,260.32, is also allowed, subject to the reservation hereinafter provided.

But the allowance of the said credits on account of the said 250 coupons and on account of said 24 bonds shall not be taken and held as an adjudication by the court herein that the said Louisville and Nashville Railroad Company, as beneficiary under the trust held by the plaintiff, is exempt from or liable for any part or proportion of the charges and expenses of the plaintiff trustee and of said trust. If it shall hereafter appear upon the distribution of the fund herein that said coupon should not have been paid in full, but should have been paid *pro rata* with other coupons, or that the amount allowed the Louisville & Nashville Railroad Company on said 24 bonds is more than the *pro rata* share of said bonds, then the amount of excessive payment made upon said coupons or upon said bonds shall be adjusted in the distribution of the fund herein, whenever the same shall be made, so as to equalize the beneficiaries under the said trust with the Louisville & Nashville Railroad Company as the owner of the said 250 coupons and said 24 bonds.

After allowing the credits aforesaid the balance due upon said judgment is the sum of $77,784.45, and the said Louisville & Nashville Railroad Company is adjudged and ordered to pay the said sum into court on the 7th day of April, 1898.

To the ruling of the court in holding the response insufficient the Louisville & Nashville Railroad Company excepts, and from
519 this judgment the said Louisville & Nashville Railroad Company prays an appeal to the court of appeals, which is granted.

And the appellant desires to supersede said judgment.

Now, we, Louisville & Nashville Railroad Company and John D. Taggart, Attilla Cox, John L. Helm, and M. H. Smith, sureties, do hereby covenant to and with the appellee, A. L. Schmidt, trustee, &c., that the appellant will pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed, and any judgment or order which the court of appeals may render or order to be rendered by the inferior court not exceeding in amount of value the judgment aforesaid, and also pay all rents, hire, or damages which, during the pendency of the appeal, may accrue on any part of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 4th day of April, 1898.

LOUISVILLE & NASHVILLE R. R. CO., [SEAL.]
By M. H. SMITH, *P't.*
JOHN D. TAGGART.
JOHN L. HELM.
ATTILLA COX.
M. H. SMITH. [SEAL.]
Attest: JOHN H. PAGE, *Clerk*,
By ALBERT S. RAU, *D. C.*

520 STATE OF KENTUCKY, *Jefferson County,* } *sct:*

John D. Taggart, Attilla Cox, John L. Helm (resides at Elizabethtown, Ky.), M. H. Smith states that they are residents of the State of Kentucky, residing in Jefferson county and Louisville city, on —— street between —— and —— ; that they are worth $155,568.90 beyond the amounts of their debts, and have property in said State subject to execution of the value of $155,568.90.

JOHN D. TAGGART.
ATTILLA COX.
JOHN L. HELM.
M. H. SMITH.

Sworn before me by John D. Taggart, Attilla Cox, John L. Helm, & M. H. Smith this 4th day of April, 1898.

JOHN H. PAGE, *Clerk*,
By ALBERT S. RAU, *D. C.*

And thereupon the clerk issued supersedeas and copy, which is as follows:

STATE OF KENTUCKY, }
Jefferson County. }

Jefferson Circuit Court.

A. L. SCHMIDT, Trustee, Appellee,
versus
LOUISVILLE AND NASHVILLE RAILROAD Company, Appellant. } Supersedeas. No. 1860.

521 I, John H. Page, clerk of the Jefferson circuit court, law & equity division, in the county and State aforesaid, do hereby certify that an appeal has been granted from this court from a judgment obtained by A. L. Schmidt, trustee, against the Louisville & Nashville Railroad Company for $77,784.45, in the Jefferson circuit court, law & equity division, on the 2nd day of April, 1898, and that a supersedeas bond has been executed after the appeal was granted. Therefore the appellee and all others are commanded to stay proceedings on the judgment aforesaid.

Witness John H. Page, clerk of said court, this 4th day of April, 1898.

JOHN H. PAGE, *Clerk*,
By ALBERT S. RAU, *D. C.*

Return on said supersedeas is as follows:

Come to hand Apr. 4th, 1898, at 2 p. m.

Executed April 11, 1898, on A. L. Schmidt, trustee, by delivering to him a copy of the within supersedeas.

H. A. BELL, *S. J. C.*,
By W. B. THIXTON, *D. S.*

522 STATE OF KENTUCKY, }
County of Jefferson. }

I, John H. Page, clerk of the Jefferson circuit court, do hereby certify that the foregoing 48 pages contain a full, true, and complete transcript of the record and proceedings, from and including the filing of the mandate of the court of appeals, had in the case where Adolph L. Schmidt is plaintiff and the L., C. & L. Railway Co., &c., are defendants, # 1860, old law and equity, as the same appears of record and on file in my said office.

Witness my hand this 18th day of April, 1898.

JOHN H. PAGE,
Clerk Jefferson Circuit Court.

The following statement was made and filed with the foregoing transcript:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
A. L. SCHMIDT, in His Own Right and as Trustee for the Bondholders of the Northern Division of the Cumberland and Ohio Railroad Company; Eliza Reed, P. B. Reed, and Duff Reed, as Executors of Leander Reed, Deceased; George L. Peter,
523 Henry Peter, and G. W. Lewman, as Executors of Jacob Peter, Deceased; James McCarthy, George H. Breed, P. Booker Reed, Jane M. Reed, and W. C. Reamer, for Themselves and Other Owners of said Bonds, Appellees. } Statement.

This is an appeal from a judgment of the Jefferson circuit court, law and equity division, rendered on April 2nd, 1898, and to be found on pages 35, 36, and 37 of the transcript herewith this day filed.

The names of the appellant and of the appellees are fully shown in the foregoing caption, and no summons need be issued or warning order made upon this appeal, inasmuch as this transcript is filed by the appellees herein, who now enter their appearance to this appeal.

PIRTLE & TRABUE,
SIMRALL, BODLEY & DOOLAN,
Attorneys for Appellees.

The appellees, by counsel, made the following endorsement on the record:

The undersigned, counsel for A. L. Schmidt, &c., appellees herein, state that they have carefully examined the record and believe the appeal is prosecuted for delay merely.

524 April 19th, 1898.

JAMES S. PIRTLE,
SIMRALL, BODLEY & DOOLAN,
Counsel for Appellees.

Afterwards, on the 30th day of April, A. D. 1898, at a court of appeals held at the capitol, in the city of Frankfort, in and for the Commonwealth of Kentucky, the following order was entered herein:

L. & N. R. R. Co., Appellant,
v.
A. L. SCHMIDT, &c., Appellees. } Jeff.

Appellee-, by counsel, filed a notice and moved the court to affirm the judgment herein as a delay case; to which motion appellant, by counsel, objected, and the cause is submitted on the motion.

The notice referred to above is not copied.

Afterwards, on June 16, 1898, at a court of appeals held as aforesaid, the following order was entered herein:

The court, being sufficiently advised of the motion to affirm as a delay case, refused to entertain said motion. Opinion delivered.

Afterwards, on September 19, 1898, at a court of appeals held as aforesaid, the following order was entered herein:

525 Came the appellees, by counsel, and filed a notice and grounds, and moved the court to affirm the judgment herein as a delay case; to which motion the appellant, by counsel, objected, and the motion is submitted.

Afterwards, on October 27, 1898, at a court of appeals held as aforesaid (present, Chief Justice Lewis and Judges Guffy, Du Relle, & White) the following judgment was entered:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant, *vs.* A. L. SCHMIDT, &c., Appellees.	Jefferson Law & Equity Div.

The court being sufficiently advised, the motion to affirm the judgment herein as a delay case is sustained.

It is therefore considered that said judgment be affirmed as a delay case, and that appellees recover of the appellant ten per cent. damages on the amount of the judgment superceded herein, which is ordered to be certified to said court.

It is further considered that appellees recover of appellant their cost expended herein.

526 The parties, by counsel, filed in the office of the clerk of the Kentucky court of appeals the following agreement and stipulation as to the transcript of record in this case:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant, *v.* A. L. SCHMIDT, Trustee, ET AL., Appellees.

It is agreed that the clerk of this court, in making up the transcript for the Supreme Court, may copy the complete records of the different appeals in this court, except as hereinafter indicated:

1. Report of Special Commissioner R. T. Calvert, which includes about five volumes of original matter now on file in the clerk's office of the court of appeals; also the depositions taken on exceptions to said report of Calvert, being the depositions of Robert E. Sewell, certified Oct. 10, 1888, with the exhibit attached.

Also the additional report of said Commissioner E. T. Calvert, filed December 5, 1887.

Also papers filed on trial of the question of allowance to the commissioner for fee for said report of Calvert, being papers filed June 11, 1888; depositions filed June 23rd and 30th, 1888, on said com-

missioner's allowance, and depositions filed May 9, 1892, of E. L. Calvert, and June 17, 1892, of W. S. Macrae and James Ferrier.

2. Cross-interrogatories filed December 10, 1888, addressed to R. E. Sewell and Edward Roland.

3. Plaintiff's interrogatories filed February 18, 1889.

4. Depositions of Jacob Krieger, Leander S. Reed, filed December 10, 1889, with exhibit attached relating to the branch from Shelbyville to Anchorage.

527 5. Affidavit of Jacob Krieger and papers attached, filed Feb. 19, 1891.

6. Plaintiff's interrogatories filed April 4, 1892, addressed to B. H. Young, St. John Boyle, and J. D. Kershaw.

7. Affidavit- of John A. Middleton, I. W. Crawford, and Gideon King, tendered June 14, 1886.

8. Motion of J. S. Miller for allowance, filed June 20, 1892.

9. Order in Miller's favor, May 11, 1891.

10. Supersedeas bond on Miller's claim, Aug. 14, 1888.

11. E. T. Calvert's additional affidavit, July 2, 1888.

12. Supersedeas issued on Miller's judgment, Aug. 14, 1888.

13. Motion of Miller, February, 1892, on allowance.

14. Order, March 14, 1892, giving additional time to except to report.

15. Affidavit of C. T. Vennigerholz, filed December 13, 1892, on commissioner's allowance.

16. Affidavit of E. Thompson, tendered June 6, 1886.

17. Affidavit of Jacob Krieger, filed June 14, 1886.

18. Bill of exceptions filing affidavits July 19, 1886. Deposition of J. K. McCracken, filed April 26, 1892.

19. Order, April 11, 1888, extending time to file exceptions to the report.

20. Order, July 3, 1888, suggesting death of Wilder.

21. Affidavit of Leander S. Reed, tendered June 14, 1886.

22. Interrogatories to R. E. Sewell and Edward Roland, Aug. 20, 1888.

23. Affidavit- of James B. Wilder, Jacob Krieger, Sr., and Edward Fulton, tendered June 7, 1886.

24. Affidavit- of G. C. Gilbert, Yoder Poignard, S. F. Campbell, George R. Stone, tendered June 14, 1886.

25. Notice to take depositions, December 28, 1890.

528 26. Order, Dec. 2, 1886, to take report from office to prepare exceptions.

27. Order, July 19, 1886, refusing affidavits of Thompson and others.

28. Notice of motion on commissioner's allowance, filed June 20, 1892.

29. Order, June 18, 1888, to take depositions on notice and fill blanks in plaintiffs' exceptions.

30. Order of April 25, 1888, extending time to file exceptions.

31. Order, June 14, 1886, on motion to file affidavits of Gilbert and others.

32. Order, January 22, 1891, of revivor on death of Leander Reed.

33. Also the parts on the record marked on the margin by Judge Pirtle to be omitted in making the transcript of the record, and in addition to those parts the following can also be omitted:

34. Volume 1, filed 13th of August, 1892, pages 56 to 118, both inclusive; same, pages 159 to 180, both inclusive; same, pages 185 to 198, both inclusive; same, pages 26 to 28, both inclusive; pages 34, 35, 38, and 39 as marked; all volumes 2 and 2½, filed Dec. 6th, 1888.

35. The opinions of the court of appeals and superior court, it being agreed that the opinions of the court of appeals as reported may for the purposes of this appeal be considered as part of the record, and the counsel for either party may make the same use of them in the Supreme Court as if copied into the record.

36. Also all proceedings in the superior court on appeal taken to that court with reference to the fees of Commissioner Miller.

529–531 The foregoing stipulation is made without prejudice to the right of the plaintiff in error to avail itself of subsection 9 of rule 10 of the Supreme Court.

PIRTLE & TRABUE,
Attorneys for Appellees.
HELM & BRUCE,
For Appellant.

The report of Calvert covers about five (5) thousand pages, and occupied about ten (10) months' time in making same, with the aid of another deputy, for which he charged four thousand dollars ($4,000).

Calvert was selected special commissioner as a railroad expert. His report was a statement of the gross earnings derived by the defendant in the action on business coming to it from or over the Northern division of the Cumberland and Ohio railroad under the lease, contract, and mortgage between the said parties, and of the expense incurred in handling the business, with various theories and statements showing what proportion of the expense of the whole Louisville and Nashville Railroad system should be deducted from its gross earnings, in order to show the net earnings to which the plaintiffs The Cumberland and Ohio Bondholders were entitled under their mortgage and lease.

PIRTLE & TRABUE.
For Plaintiff-.
HELM & BRUCE,
For Appellant.

The appellant, by counsel, on the 1st day of Dec'r, A. D. 1898, filed in the clerk's office of said court of appeals a writ of error allowed by the chief justice of said court, a copy of which is on file in said clerk's office, and which is as follows:

532 UNITED STATES OF AMERICA, } ss:
District of Kentucky, Sixth Judicial Circuit, }

The President of the United States to the honorable the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in a suit between The Louisville and Nashville Railroad Company, appellant, and A. L. Schmidt, in his own behalf and as trustee for the bondholders of the Northern division of the Cumberland and Ohio Railroad Company; Eliza Reed, P. B. Reed, and Duff Reed, as executors of Leander Reed, dec'd; George L. Peter, Henry Peter, and G. W. Lewman, as executors of Jacob Peter, dec'd; James McCarty, George H. Breed, P. Booker Reed, Jane M. Reed, and W. C. Reamer, for themselves and other owners of said bonds, appellee-, wherein was drawn in question the validity of an authority exercised under said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, and where a right, title, privilege, and immunity was claimed under the Constitution of the United States and the decision was against the title, right, privilege, and immunity specially set up and claimed under said Constitution, a manifest error hath happened, to the great damage of the said Louisville and Nashville Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the *31st day of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of November, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED,
Clerk of the Circuit Court of the United States for District of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by—
JOS. H. LEWIS,
Chief Justice Ky. Ct. Appeals.

*Not exceeding 30 days from the day of signing the citation.

[Endorsed:] (1.) 1898, Dec'r 1, filed. Att.: S. J. Shackelford, cle-k.

533 On the same day, to wit, Dec'r 1, 1898, the appellant and plaintiff in error filed in said clerk's office its bond, which was approved, and is as follows:

Court of Appeals of Kentucky

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADOLPH L. SCHMIDT, Trustee, ET AL., Appellees.

Know all men by these presents that we, The Louisville & Nashville Railroad Company, John M. Atherton, John L. Helm, M. H. Smith, and Attilla Cox, are held and firmly bound unto A. L. Schmidt, in his own right and as trustee for the bondholders of the Northern division of the Cumberland & Ohio Railroad Company; Eliza Reed, P. B. Reed, and Duff Reed, as executors of Leander Reed, deceased; George L. Peter, Henry Peter, and G. W. Lewman, as executors of Jacob Peter, deceased; James McCarty, George H. Breed, P. Booker Reed, Jane M. Reed, and W. C. Reamer, for themselves and other owners of said bonds, in the sum of ninety thousand dollars ($90,000.00), to be paid to the aforesaid obligees herein, their successors, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of December, A. D. 1898.

534 Whereas the above-named Louisville & Nashville Railroad Company hath prosecuted a writ of error from the Supreme Court of the United States to the court of appeals of Kentucky to reverse the judgment rendered in the above-entitled suit by the court of appeals of Kentucky, at Frankfort:

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville Railroad Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By HELM BRUCE. [L. S.]
JOHN M. ATHERTON, [L. S.]
By HELM BRUCE, *Att'y in-fact.*
JOHN L. HELM, [L. S.]
By HELM BRUCE, *Att'y-in-fact.*
M. H. SMITH, [L. S.]
By HELM BRUCE, *Att'y-in-fact.*
ATTILLA COX, [L. S.]
By HELM BRUCE, *Att'y-in-fact.*

Sealed and delivered in the presence of—
JOS. H. LEWIS,
Chief Justice Ky. Ct. Appeals.

535 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADOLPH L. SCHMIDT, Trustee, &c., Appellees.

Each of the undersigned hereby constitutes and appoints Helm Bruce his att'y-in-fact, and authorizes him to sign his (the undersign-'s) name as surety upon a supersedeas bond to be executed upon the allowance of a writ of error from the Supreme Court of the United States to the court of appeals of Kentucky in the case of Louisville & Nashville Railroad Company *vs.* Adolph L. Schmidt, trustee, &c., wherein the said court of appeals did lately affirm in said cause, on appeal, a judgment of the Jefferson circuit court.

JOHN M. ATHERTON.
ATTILLA COX.
M. H. SMITH.
JOHN L. HELM.

Attest as to signatures of Atherton, Cox, and Smith:
L. K. HELM.

On the same day, to wit, Dec'r 1, 1898, the plaintiff in error filed in said clerk's office its assignment of errors and prayer for reversal; which is in words and figures following, to wit:

536 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD Company, Plaintiff in Error,
vs.
A. L. SCHMIDT, Trustee, &c., Defendants in Error.

Assignment of Errors and Prayer for Reversal.

The Louisville & Nashville Railroad Company, plaintiff in error in the above-entitled cause, says the court of appeals of Kentucky, in its judgment lately rendered in the case of Louisville & Nashville Railroad Company, appellant, *vs.* A. L. Schmidt, trustee, &c, appellees, and to revise which a writ of error from the Supreme Court of the United States has been allowed, erred in the following particulars, viz:

1. In affirming the judgment of the Jefferson circuit court ordering the Louisville & Nashville Railroad Company to pay into court the sum of $90,053.34, or any sum, in satisfaction of a judgment theretofore entered against the Louisville, Cincinnati & Lexington Railway Company.

2. In denying the claim of said Louisville & Nashville Railroad Company that it was not and had never been a party to the cause wherein said judgment which it was ordered to pay was rendered, nor to the said judgment, and in holding that it was a party to said cause and judgment and bound to pay said judgment.

537 3. In denying the claim of said Louisville & Nashville Railroad Company that to require it to pay said judgment

in the manner and upon the proceedings had in said cause would be to deprive it of its property without due process of law, contrary to the provisions of the Constitution of the United States.

4. The said judgment of the court of appeals of Kentucky does deprive said Louisville & Nashville Railroad Company of its property without due process of law, contrary to the provisions of the Constitution of the United States.

5. The said court of appeals erred in not reversing the said judgment of the Jefferson circuit court ordering the Louisville & Nashville Railroad Company to pay, as aforesaid, and in not ordering the proceedings against the said Louisville & Nashville Railroad Company to be dismissed.

6. The said court of appeals erred in affirming the said judgment of the Jefferson circuit court ordering said Louisville & Nashville Railroad Company, as aforesaid, to pay the amount of the judgment theretofore rendered against the Louisville, Cincinnati & Lexington Railway Company in favor of the plaintiffs in that litigation, when said Louisville & Nashville Railroad Company had never been heard or given any opportunity to be heard as to its liability
538 to said plaintiffs or any of them for the sum of money ordered to be paid or any part thereof.

Wherefore plaintiff in error prays that the aforesaid judgment of the court of appeals of Kentucky be reversed, with directions for the dismissal of all proceedings in this cause against it, the said Louisville & Nashville Railroad Company.

LOUISVILLE & NASHVILLE
RAILROAD COMPANY,
By JAMES P. HELM,
HELM BRUCE,
Att'ys for Plaintiff in Error.

539 COMMONWEALTH OF KENTUCKY, }
Court of Appeals, } *sct:*

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the foregoing 538 pages contain a complete transcript of the record used and proceedings had upon the trial of the appeal in case of Louisville & Nashville Railroad Company, appellant, against A. L. Schmidt, &c., appellees, from the law & equity division of the Jefferson circuit court, except such parts of the record and proceedings as were agreed and ordered not to be copied by written directions of the counsel, which directions are copied herein, together with the original writ of error (a copy of which remains on file in my office) and copies of the bond executed by the plaintiff in error and the assignment of errors filed by plaintiff in error; all of which is as appears of record and on file in my office.

Seal, Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 12 day of December, A. D. 1898.

SAMUEL J. SHACKELFORD,
Clerk of the Kentucky Court of Appeals.

Fee for this transcript, $238.50.

540 UNITED STATES OF AMERICA, } ss:
District of Kentucky, Sixth Judicial Circuit, }

To A. L. Schmidt, in his own behalf and as trustee for the bondholders of the Northern division of the Cumberland & Ohio Railroad Company; Eliza Reed, P. B. Reed, and Duff Reed, as executors of Leander Reed, dec'd; George L. Peter, Henry Peter, and G. W. Lewman, as executors of Jacob Peter, dec'd; James McCarty, George H. Breed, P. Booker Reed, Jane M. Reed, and W. C. Reamer, for themselves and other owners of said bonds, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the* — day of January next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein The Louisville and Nashville Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-three.

JOS. H. LEWIS,
Chief Justice Ky. Ct. Appeals.

541 [Endorsed:] $\frac{8\,3\,1}{9\,1\,8\,3}$. Louisville & Nashville Railroad Company *vs.* A. L. Schmidt *et al.* Citation. Helm Bruce, Kenyon bldg., 5th bet. Market & Main.

Executed December 6th, 1898, by delivering a true copy of the within citation to John G. Simrall, attorney of record for the defendants in error.

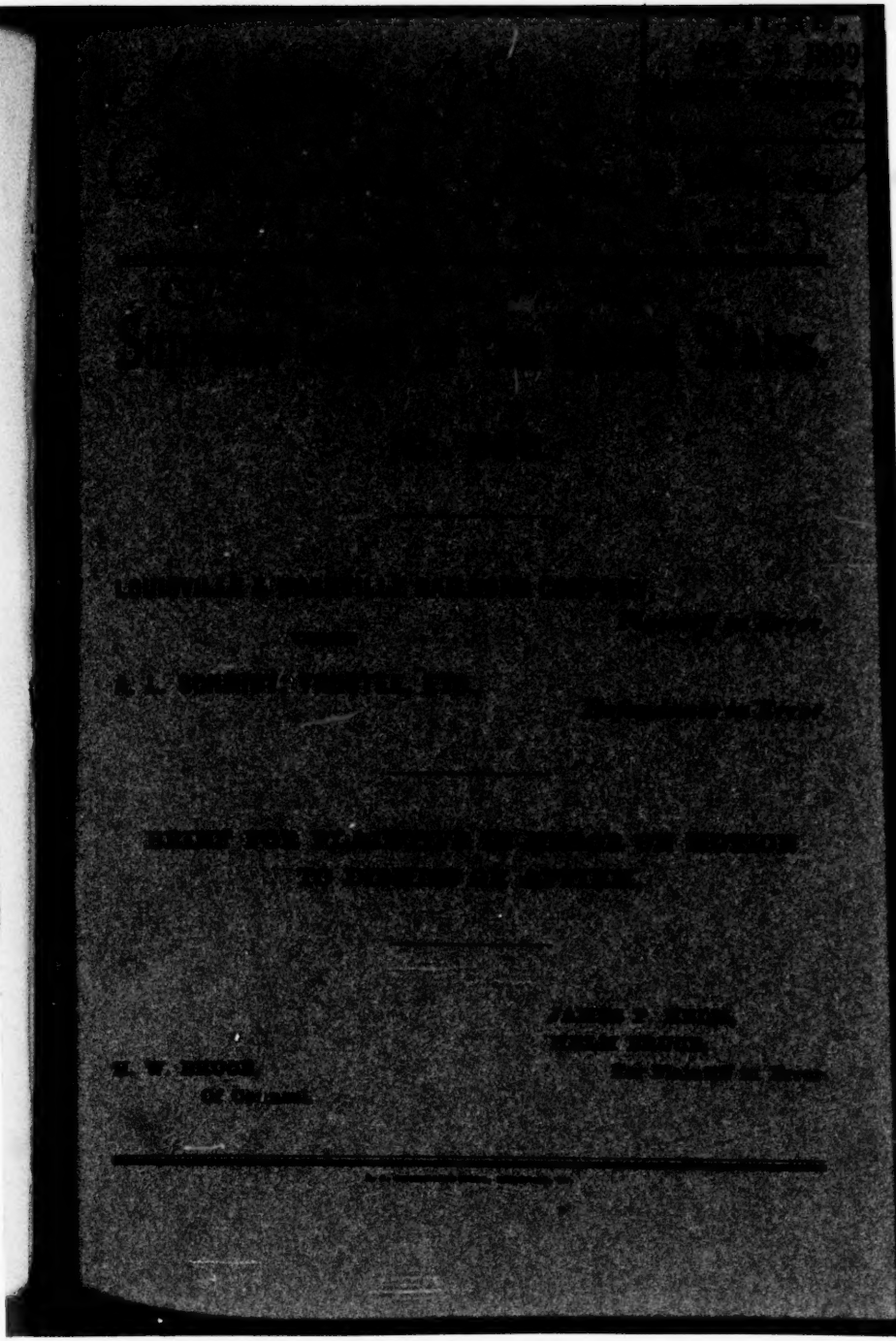
A. D. JAMES,
U. S. Marshal,
By T. A. MITCHEL,
Dept. Marshal.

Fee, $2.00.

Endorsed on cover: File No. 17,241. Kentucky court of appeals. Term No., 656. The Louisville and Nashville Railroad Company, plaintiff in error, *vs.* A. L. Schmidt, in his own behalf and as trustee for the bondholders of the Northern division of the Cumberland & Ohio Railroad Co., *et al.* Filed December 31st, 1898.

---

* Not exceeding 30 days from the day of signing.



Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... *Plaintiff in Error,*

vs.

A. L. SCHMIDT, TRUSTEE, ETC., . . *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

We have been served with notice of a motion to dismiss or affirm. In support of this motion we have been handed two briefs by separate counsel for defendants in error. These briefs together cover nearly seventy printed pages (exclusive of indexes and appendices), and are devoted mainly to a discussion of the merits of a question which, we are told in the notice, is "so frivolous as not to need further argument." One of these briefs is mainly devoted *nominally* to the question of jurisdiction, but the major part of it is really a discussion of the merits of the only question in the case, to-wit, "due process of law." The other is avowedly devoted almost entirely to a discussion of the merits. Every possible phase of the case is discussed with great elaboration, including extensive reviews of authorities on all questions involved, directly or indirectly. We can not believe that on

final submission the printed argument of counsel for defendants in error would be materially different from those submitted on this motion.

This seems to us to be a palpable perversion or abuse of the privilege accorded defendants in error, by Rule 6 of this Court.

We shall not attempt to follow all the details of the exhaustive argument in the briefs for defendant, nor attempt to respond *eo nomine* to each separate point. But we feel quite confident we can show the motion to dismiss or affirm should be overruled.

We feel that a word of explanation as to the condition of the record is proper. It contains a great deal of matter which we considered entirely irrelevant to the federal question presented to this Court; but defendants in error would not consent to the omission of anything which is now found in it. We did make an agreement (Rec. p. 317) by which a great mass of matter in the record in the State court was omitted; but we could secure the omission of no more. It was also our intention to have availed ourselves of the privilege of Rule 10, Sec. 9, of this Court, and to print only such parts of the record as we thought necessary for consideration. But we were anticipated by defendants in error, who have had the whole record printed on the present motion.

We have, however, for convenience, had an "Abstract of Record" printed, which we believe contains all that is material for the consideration and decision of the federal question.

STATEMENT.

A. L. Schmidt, as trustee for the bondholders of the Northern Division of the Cumberland & Ohio Railroad Company, uniting with him certain of the individual bondholders, instituted a suit in the Louisville Law and Equity Court *against the Louisville, Cincinnati & Lexington Railway Company*, which was the *sole defendant*. Plaintiffs claimed that *this defendant*, in taking a lease on the Northern Division of the Cumberland & Ohio Railroad (hereafter called the "C. & O.") had agreed that it would mortgage, and that it did mortgage certain *net earnings* on its *own road*, as an additional security for these bondholders of the C. & O. They claimed that such net earnings had been received by defendant, though they said they could not state the exact amount thereof; and that they had demanded of defendant the payment of the accrued interest on their bonds, but the same had been refused. Wherefore they prayed that the case be referred to the Commissioner to ascertain and report the amount of these alleged net earnings, and that defendant be required to pay same into court, to be applied to payment of plaintiffs' coupons. (Rec., 2–13; abstract, 1–12.)

As stated above, the Louisville, Cincinnati & Lexington Railway Company, the person with whom the contract was made, was the *sole defendant*. And no other person was ever made a defendant, except that subsequently a certain bondholder was made defendant on the allegation that he refused to unite as plaintiff (Rec., 32), and thereafter the Northern Division of the Cumberland & Ohio was made a formal defendant, on the allegation that it "claims to have some interest in this action." (Rec., p. 35), but no relief was demanded against it and it never appeared.

The only person against whom summons was ever issued (omitting mention of the two formal defendants) was the

Louisville, Cincinnati & Lexington Railway Company, and the return was made as executed upon it. (Rec., 13–14.)

The only person that ever answered in the cause is the Louisville, Cincinnati & Lexington Railway Company. Its answer is exceedingly brief, and simply denies that it had received any net earnings of the character alleged. (Rec. 33, Abstract 12.) This completed the issues.

There was no attempt made to impound any earnings. No application made for a receiver, and no attachment taken out. Neither was any lien claimed on the corpus of the property of the defendant, out of which the earnings, if any, arose. It was nothing more nor less than a personal *suit for an accounting* between the two parties to a contract.

Over this matter a long fight was had, during the course of which a certain report styled "R. E. S. No. 2" was filed, showing net earnings to a certain date amounting to $60,-192.27, which was finally held to be correct; and, accordingly, plaintiffs moved for a confirmation of that report and "for a rule upon *defendant—Louisville, Cincinnati & Lexington Railway Company*—to pay into Court the sum of $60,192.27, the amount of net earnings shown by report of R. E. Sewell marked 'R. E. S. No. 2.'" And thereupon the Court entered a judgment, allowing defendant a certain credit against the amount stated above, leaving a balance of $53,565.62, which it ordered to be paid into Court by a certain day, and issued a rule against defendant to pay same, returnable on the day named. (Rec. 214, Abstract 15.) This was on *June 1, 1894.*

To this rule the defendant responded that it had no funds with which to comply with the order of the Court. (Rec. 215, Abstract 16.)

Plaintiffs first took issue on this response by a reply thereto, but subsequently offered to withdraw the reply, and on May 27, 1895 (*a year after the entry of the final judgment in the cause*) offered to file an "an amended and supplemental petition making the *Louisville & Nashville Railroad*

Company a party to this suit." (Rec. 222; Abstract 21.)

This "supplemental" petition here offered was an elaborate pleading alleging practically the same facts which had been alleged in the original petition against the Louisville, Cincinnati & Lexington Railway Company; but further alleging that *in 1881*, which was *before the institution of this suit*, the Louisville & Nashville Railroad Company had purchased the railroad of the Louisville, Cincinnati & Lexington Railway Company, and had received its earnings, and had conducted the defense of this suit against the Louisville, Cincinnati & Lexington Railway Company. And accordingly plaintiffs prayed that the Louisville & Nashville Railroad Company be made a defendant, and for judgment against it for the subjection of the earnings made on the railroad of the Louisville, Cincinnati & Lexington Railway Company. (Rec. 224–234). This supplemental petition is not copied into the Abstract of Record, because it was never allowed to be filed, and its statements were subsequently repeated in an affidavit, which was afterwards filed, and which is copied into the Abstract, p. 23.

The Court refused to allow this "supplemental" petition to be filed, or the Louisville & Nashville Railroad Company to be made a party defendant; proceeding upon the principle well settled in Kentucky, and everywhere else, that when a final judgment has been entered in a cause and the time has passed in which the court has control over its judgments, *the cause is at an end*, and it is too late then to open it up and bring in new parties, and grant relief against them. (Meadows vs. Goff, 90 Ky. 541; Brown vs. Vancleave, 86 Ky. 381.)

Plaintiffs then appealed to the Court of Appeals from the order refusing to allow this amended petition to be filed.

The Court of Appeals *affirmed* this judgment or order on April 4, 1896; and held that it was too late to bring a new party into the cause; but said in its opinion that if the facts stated in the amended petition were true the Louisville &

Nashville Railroad Company was "*already a party* defendant and bound by the judgment"; and that the proper thing to do would be either to institute a separate suit against the Louisville & Nashville Railroad Company, setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Company in this suit by the rule based upon an affidavit stating the facts set out in the amendment. (Abstract 56–63; 99 Ky. 143–155).

The Court's attention was immediately called to the fact that the only matter before it was as to the propriety of the order of the lower court in refusing to allow the amendment to be filed, and that the question of what subsequent proceedings plaintiffs should take was not before the Court. Thereupon the Court, in a modified opinion, conceded that "the opinion *went too far* in stating that questions were decided which were not strictly before the Court upon the appeal," and that what was said, as noted above, should be treated as having been said only *arguendo*. (Abstract 64; 99 Ky. 156.)

Upon the return of the cause to the lower court plaintiffs adopted the suggestion of the Court of Appeals; filed an *affidavit* practically repeating the statements of the amended petition (Rec. 262; Abstract 23) and moved for a rule against the Louisville & Nashville Railroad Company to pay into court the sum of $53,565.62, the amount fixed in the judgment against the Louisville, Cincinnati & Lexington Railway Company. (Rec. 261; abstract 22.)

The lower Court, however, treating the language of the opinion of the Court of Appeals, heretofore mentioned, as a suggestion and not an adjudication, declined to issue the rule; and in this connection delivered a written opinion giving its reasons for so doing, which we submit, for lucid exposition of fundamental legal principles and learned review of authority, would do honor to any court. (Rec. 272; Abstract 33.) It showed that the suit was solely against the Louisville,

Cincinnati & Lexington Railway Company, the original party to the contract with plaintiffs; that the Louisville & Nashville Railroad Company was not made a party defendant, though it had bought the railroad of the Louisville, Cincinnati & Lexington Railway Company, by duly recorded conveyance, *four years before this suit was instituted;* that no process had ever issued against it; nor had it ever entered its appearance; and that no judgment had ever been entered against it; and neither was it a *pendente lite* purchaser, for whatever it purchased of the Louisville, Cincinnati & Lexington Railway Company was years before the suit was brought, as shown by duly recorded conveyance; that if the Louisville & Nashville Railroad Company were in fact liable it might seem a hardship to have to institute an original suit against it; but that it was plaintiffs' own fault that he had never brought that party before the Court; that *the Court could not know what defenses it had;* but it was entitled to "its day in court." (Rec. 272; Abstract 33.)

Accordingly, as said above, the Court declined to issue any rule against the Louisville & Nashville Railroad Company, or to treat it in any manner as a party to that cause.

On appeal to the Court of Appeals it adhered to the views it had expressed in its opinion heretofore mentioned, and held that the lower court ought to have issued the rule as requested. (Abstract 65; 44 S. W., Rep. 130.)

On return of the cause to the lower court plaintiffs renewed their motion for a rule, and thereupon the Court issued a rule against the Louisville & Nashville Railroad Company to "show cause why it shall not be required to pay into court the sum of $53,565.62, as shown by the report herein of R. E. Sewell, No. 2, together with interest . . . which principal and interest now amounts to the sum of $90,181.87." (Rec. 292; Abstract 49.) Or, as subsequently expressed by the Court of Appeals, the Court "awarded a rule against the appellant company to show cause why it should

not be compelled to pay into court *the amount of the judgment rendered against the Louisville, Cincinnati & Lexington Railway Company.*" (Abstract 68; 47 S. W. Rep. 583.)

This was the first time in all the history of this litigation that any pretense of process had ever issued against the Louisville & Nashville Railroad Company; the first time it had ever been called upon to make answer or response to any one; and then the call was to *show cause why it should not pay a judgment for money which had been theretofore entered against some one else.*

Being thus called on for the first time in the litigation it filed a response, in which, among other things, it said:

First. "That it is not a party to this suit. *It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent, or that is applicable to this "respondent, and no judgment or order has ever been "entered in this case against this respondent, and no pro-"cess has ever issued against or ever been served on this "respondent.*"

Second. "*There has never been a time from the insti-"tution of this suit up to this time when this respondent "could, with propriety, have filed an answer setting up its "defenses against the alleged claim of the plaintiff, and to "require it now to pay into court upon this rule the amount "stated in the rule, or any other amount, WOULD BE TO "DEPRIVE THIS RESPONDENT OF ITS PROP-"ERTY WITHOUT DUE PROCESS OF LAW, "CONTRARY TO THE CONSTITUTION OF THE "UNITED STATES IN SUCH CASES MADE "AND PROVIDED.*

"If the plaintiff should be required, in the usual and "orderly way, to institute a suit against this respondent "to hold it liable for plaintiffs' alleged claim, this

"respondent has and could and would present good, valid "and subsisting defenses thereto."

Third. The third paragraph of the response simply showed that if the judgment be considered a judgment against the Louisville & Nashville Railroad Company in favor of the bondholders, it should not be required to pay the full amount into court, because it held some of the bonds itself.

Fourth. The fourth paragraph showed that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser; and outlined what had been the manifest understanding and conduct of the case up to the time the Court of Appeals threw out the suggestion heretofore mentioned. It showed that the suit was instituted against the Louisville, Cincinnati & Lexington Railway Company, because it was the party with whom plaintiffs had made their contract; though *plaintiffs knew, when they filed their suit, that the Louisville & Nashville Railroad Company was then the owner of the property which had been the railroad of the Louisville, Cincinnati & Lexington Railway Company;* though so far as concerned the assignment of the lease on the Northern Division of the Cumberland & Ohio Railroad, the latter had refused to consent to the assignment; and that plaintiffs instituted their suit against the Louisville, Cincinnati & Lexington Railway Company *on the contract*, believing that it could not avoid its liability by assigning the lease; it being the policy of plaintiffs first to get a judgment against the Louisville, Cincinnati & Lexington Railway Company, with whom they had the contract, and then, if they should fail to procure satisfaction of the judgment, sue the Louisville & Nashville Railroad Company and seek to hold it responsible. The response also showed that the *Louisville, Cincinnati & Lexington Railway Company was a distinct corporation and had continuously preserved its organization.*

Upon the filing of this response plaintiffs moved to make the rule absolute, and the Court did so, entering a judgment in which, after making certain recitals as to the submission and filing of the opinion, etc., it proceeded as follows:

"And it is ordered and adjudged that the said response to "the said rule is *insufficient*, and the said rule is made abso- "lute, and the said Louisville & Nashville Railroad Com- "pany is ordered to pay into Court the amount of judgment "herein, the said sum of $90,053.34, as of March 21, 1898, "subject, however, to the following credit, viz.: . . .

"After allowing the credit aforesaid, the balance due "upon said judgment is the sum of $77,784.45, and the said "Louisville & Nashville Railroad Company is adjudged and "ordered to pay the said sum into Court on the 7th day of "April, 1898.

"To the ruling of the Court in holding the response "insufficient, the Louisville & Nashville Railroad Com- "pany excepts." (Rec. 308.)

In entering this judgment the Circuit Court filed an opinion in which it again vigorously protested that this was *not due process of law*, but said it felt bound to adopt the views of the Court of Appeals, as expressed when it said the rule should issue. (Abstract 52; Rec. 309.)

The Louisville & Nashville Railroad Company then appealed to the Court of Appeals from this judgment, where it was affirmed.

In view of the argument for defendant in error that this entire cause was simply a proceeding *in rem*, it is very instructive to note the view taken by the Court of Appeals at the conclusion of the cause as to the nature of the judgment entered. The Court itself, in a former opinion, had spoken of the proceeding as one *in rem*, and when its attention was

called to this by appellant in resisting the application for damages on the supersedeas bond, the Court said:

"While this is true, yet the proceeding to compel the "payment of the fund into Court by the appellant company "is *essentially personal* against it, and a judgment, to be "enforced by rule, directing appellant to pay the amount "of the judgment into Court is, in our opinion, *essentially* "*a personal judgment, upon which the Court might have* "*ordered execution to issue.*" (Abstract 69; 47 S. W. Rep. 583.)

It will be remembered that the only kind of judgment ever entered in the cause *against any one* was a judgment ordering money to be paid into Court, and directing a rule to issue to compel its payment. And this was the character of judgment which the original petition prayed for. What, therefore, the Court meant by saying that the *proceeding*, seeking such a judgment, was *essentially in rem*, but that the judgment, when thus obtained, was *essentially in personam*, we confess our inability to explain. But the important fact to be remembered is that the Court of Appeals has held in this case that such a judgment as was entered in this cause is "essentially a *personal* judgment, upon which the Court might have *ordered execution to issue.*"

After the judgment of affirmance was entered, the writ of error from this Court was allowed. Then came the motion to dismiss for want of jurisdiction, or to affirm because the federal question is so frivolous as not to need further argument.

MOTION TO DISMISS.

The Revised Statutes of the United States (Sec. 709) provide:

"A final judgment or decree in any suit in the highest "court of a State in which a decision in the suit could be "had . . . where any title, right, privilege or im- "munity is claimed under the Constitution . . . of . . . "the United States, and the decision is against the title, "right, privilege or immunity specially set up or claimed "by either party under such Constitution . . . may "be re-examined and reversed or affirmed in the Supreme "Court upon a writ of error."

In Chicago, Burlington, &c. R. Co. vs. Chicago, 166 U. S., 226, an effort was being made to condemn a right of way for a street across the right of way of a defendant railroad company. There was a verdict and judgment of condemnation, fixing the damages to the railroad company at one dollar. On motion for a new trial it claimed that its property would by this judgment be taken without due process of law. The motion was overruled. The judgment was, on appeal, affirmed. A writ of error from this Court was allowed. A motion was made to dismiss, and this Court said:

"If the right now asserted under the Constitution of "the United States was specifically set up or claimed by "the defendant in the State Court, the motion to dismiss "must be overruled. (Rev. Stat., Sec. 709.)

"Now the right in question was distinctly asserted by "the defendant in its written motion to set aside the ver- "dict and grant a new trial. . . .

"When the trial Court overruled the motion for a new "trial and entered judgment, it necessarily held adversely "to these claims of Federal right. . . . The judg- "ment of affirmance necessarily denied the Federal rights "thus specially set up by the defendant, for that judgment "could not have been rendered without deciding adversely "to such claims of right. Those claims went to the very "foundation of the whole proceeding, so far as it related "to the railroad company, and the legal effect of the judg- "ment of the Supreme Court of the State was to deny "them. . . . There is, we conceive, no room to "doubt that the legal effect of the judgment below was to "declare that the rights asserted by the defendant under "the National Constitution were not infringed by the pro- "ceedings in the case, consequently the motion to dismiss "for want of jurisdiction must be overruled."

In the case at bar the very first time that any semblance of process was issued against the present plaintiff in error, the very first time it was called on to speak, and before any order was ever made against it, except the order for the issuance of a show-cause rule, it responded and especially set up and claimed a right under the Federal Constitution in unmistakable terms as follows, viz.:

"The Louisville & Nashville Railroad Company, for "response to the rule against it herein . . . says:

First. "That it is not a party to this suit. It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent or that is applicable to this re- "spondent, and no judgment or order has ever been en- "tered in this case against this respondent, and no pro- "cess has ever issued against or ever been served on this "respondent.

Second. "There has never been a time from the insti-
"tution of this suit up to this time when this respondent
"could, with propriety, have filed an answer setting up its
"defenses against the alleged claim of the plaintiff, and *to*
"*require it now to pay into court upon this rule the amount*
"*stated in the rule, or any other amount, would be to de-*
"*prive this respondent of its property without due process of*
"*law, contrary to the Constitution of the United States in*
"*such cases made and provided.*"

This specially set up and claimed a right under the Federal Constitution as plainly as could possibly have been done, and when the Circuit Court adjudged this response "insufficient," and made the rule absolute, and ordered the respondent to pay into court the amount named in the rule, this was a denial of the Federal right claimed in the response.

There was no assignment of errors in the Court of Appeals, because there is no such thing known to the law of the State. An appeal takes up the whole case and all rulings made by the trial court. And when the Court of Appeals affirmed the judgment of the Circuit Court, holding the response insufficient, making the rule absolute, and ordering the respondent to pay into court the amount named in the rule, it necessarily denied the Federal right claimed in the response. And, as said by this Court in the case cited, that claim of right "went to the very foundation of the whole proceeding," and the judgment of affirmance "could not have been rendered without deciding adversely to such claims of right." There was no other ground on which the decision was or could have been rested. If that claim of right had been sustained it would necessarily have resulted in a reversal of the judgment with directions to discharge the rule.

To adopt again the language of the opinion cited:

"There is, we conceive, no room to doubt that the legal
"effect of the judgment below was *to declare that the rights*

"*asserted by the defendant under the National Constitution* "*were not infringed by the proceedings in the case.* Conse- "quently the motion to dismiss for want of jurisdiction "must be over-ruled"

As to whether or not the property of plaintiff in error is, by this judgment, taken "without due process of law," as to whether the judgment shall be affirmed or reversed, is a question to be hereafter determined. But as to the jurisdiction—"the power to hear and determine" this question so distinctly made in the State Court by plaintiff in error, and so clearly decided against it—we can perceive absolutely "no room to doubt."

Council for defendant in error, under the name of "jurisdiction," discuss elaborately the merits of the only question this Court can consider, if it has jurisdiction, viz.: was plaintiff in error deprived of its property without due process of law? Under the title, "jurisdiction," they insist that plaintiff in error *did have a hearing*, and therefore its property *was not taken without due process of law.* But that is the very question which we ask this Court to "hear and determine"; to do which is to exercise "jurisdiction."

They say the decision of the State Court was based upon a "question of procedure." But we say that "procedure" was not "due process of law." When a subject of the Sultan of Turkey is sewn up in a bag and quietly dropped into the Bosphorus, under cover of night, without a chance to ask, "Why?" this may be said to be a "matter of procedure"; but it is not such procedure as in Anglo-Saxon countries would pass for "due process of law." When George Jeffreys presided at the "Bloody Assize," he was the Chief Justice of England, and hundreds of men lost life, liberty or property by process of law; but Englishmen have never believed that the judicial tragedies of that dark day were accomplished by, *due* process of law. In Murray's lessee vs. Hoboken Land,

&c., Co., 18 Howard, 272–276, this Court said: "That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' . . . It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and can not be so construed as to leave Congress free to make any process 'due process of law' by its mere will." In the much later case of Davidson vs. New Orleans, 96 United States, 97–102, in speaking again of process which had been provided by legislative act, this Court said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application, where the invasion of private rights is affected under the forms of State legislation." And in the very recent case heretofore cited of Chicago, Burlington, &c., R. R. Co. vs. Chicago, 166 United States, 226–235, this Court, after quoting the language which we have just quoted from Davidson vs. New Orleans, said: "*The same question could be propounded, and the same answer should be made in reference to* JUDICIAL PROCEEDINGS *inconsistent with the requirement of due process of law.*" Manifestly it is no bar to a consideration of the question which we have submitted to this Court, to say that it is merely a "question of procedure." There lies a deeper question, and it is this: Was that procedure or process "*due* process of law?"

But counsel say the Federal question was not "*seasonably* raised." They say "the opinion of the Court of Appeals *announcing the doctrine*" of which we complain was delivered in 1896, and there was no claim of Federal right till March 21, 1898. Counsel well speak of this as a "doctrine"; it certainly was not a judgment, as the Court itself conceded. But it was not that enunciation of a "*doctrine*"

that deprived plaintiff in error of its property; it was the subsequent entry of a *judgment* in the Circuit Court, and its subsequent affirmance in the Court of Appeals. And, as we have seen, before any such judgment was entered, and the very first time plaintiff in error was called on to speak, it specially set up and claimed this Federal right.

We shall not attempt to follow defendant's counsel in their citation of authorities on this jurisdictional question. In some the question was not properly raised. In others the decision rested on other grounds than the one involving the Federal question, and would have been just the same if the Federal question had been decided for the party complaining. To review these authorities would require an explanation as to each of them, and we can not believe this is necessary, in view of the plain letter of the statute, and the equally plain enforcement thereof in Chicago, Burlington, &c., R. Co. vs. Chicago, 166 U. S. One striking feature of the briefs for defendant in error, which show great industry and research for authority, is that neither one of them makes any reference whatever to the case just mentioned, which is so recent, so strong, and so strikingly in point.

We submit that there is not only no ground, but not even "color," for the motion to dismiss; and that a defendant in error has no right to make such a motion, simply for the purpose of cutting off argument by uniting therewith a motion to affirm; and the latter motion should, for that reason alone, be overruled. We, however, are of course compelled to discuss it, as if it were properly made, and to discuss it at some length, for the whole case of plaintiff in error is put at stake by this motion; though defendant in error risks nothing.

MOTION TO AFFIRM.

1. Counsel say "the question which plaintiff in error attempts to raise has long been so conclusively settled against its contention that it is no longer open for argument"; and again, that it is "so frivolous as not to need further argument." And yet, as heretofore noted, they submit on this subject, briefs covering nearly *seventy printed pages* (exclusive of indexes and appendices) *devoted mainly to the merits* of this "frivolous" question—for much that purports to be a discussion of jurisdiction is in reality a discussion of the merits; and what is more striking still is, that upon this question, which they say "has been so long settled that it is no longer open for argument," they, with all their diligence and research, have not produced one single authority, whether text-book or judicial decision, to show that in all the history of English or American jurisprudence a simple *judgment for money against one person, the sole defendant in the cause*, was ever enforced as if it were *a judgment for money* against *an entirely different person* not named in it, nor even shown by the record to be a party to the cause in which it was entered. *Yet that is what was done in this case.*

Let us examine the authorities relied on. We have read with care every case cited by the Court of Appeals or by counsel for defendants in error; in addition to which we have conducted an independent research; and we believe it can be truly said that the case at bar, so far as relates to the proceedings against the Louisville & Nashville Railroad Company, is *absolutely unique in jurisprudence.*

Many cases can be found where a judgment has been held to be binding *as conclusive evidence on certain points* against one who was not a party to the record of the cause wherein it was entered; and again judgments involving the disposition of specific property have been enforced by rule

against *pendente lite* purchasers. But those cases are far different from this one.

Thus Lovejoy vs. Murray, 3 Wall., 18, is extensively quoted in the brief of counsel, and is as strong and as pertinent as any case they cite. And no case could better illustrate what is the really true principle involved in these cases, and the false application of it in the case at bar. There property had been taken by a sheriff under an attachment. A stranger claimed it. Plaintiff gave the sheriff an indemnifying bond; whereupon the sheriff sold the property. The stranger sued the sheriff in tresspass; the sheriff gave his indemnitor notice; the latter employed counsel and took charge of the defense. Plaintiff recovered a judgment for damages against the sheriff; of which, however, he only received partial satisfaction. He desired then to proceed against this indemnitor. But how did he proceed? He could not in that case have proceeded by execution or rule, because the indemnitor was a non-resident. He had to go to his State to reach his property. But how did he proceed there? He did not treat the indemnitor as a party defendant to the judgment, and simply sue *on the judgment;* but he sued him *in trespass*, exactly as he had done the sheriff. This Court held that in this action of trespass the plaintiff had three points to establish, viz.: (1) his title to the goods taken, (2) their value, and (3) the participation of the defendant in the conversion or trespass. And the Court further held that the first and second points were proved by the record of the action against the sheriff, and the last point was proved by the production of the indemnifying bond. This was very far from treating the judgment as a money judgment against the indemnitor. It left the latter *free to set up any defense he might have* against this claim of personal liability, and simply made the judgment conclusive on the two points mentioned.

Elliott vs. Hayden, 104 Mass., 180, from which counsel also quote, is very much like the case just cited, except it is a State Court case, and all the proceedings occurred in the same State. Plaintiff, a claimant of property, recovered judgment against an attaching officer in an action for *conversion*. An indemnifying bond had been given the officer. Plaintiff desired to pursue the indemnitor. If such a doctrine as is now advocated had then ever been heard of in Massachusetts, plaintiff would have filed an affidavit and asked for an order directing either an execution or a rule to pay against the indemnitor. But he did neither. He sued him *in conversion*, as he had done the officer, and offered his judgment in evidence on certain points.

Cases like these have long been familiar to the profession. Is it not then most remarkable that never before the present case was such process as was pursued here ever adopted in any court of justice?

Strong reliance is also placed on Eagle Mfg. Co. vs. Bradley Mfg. Co., 50 Fed. Rep. 193; from which an extensive quotation is made in the brief. Plaintiff first sued David Bradley & Co., who were selling certain patented articles, for an infringement of its patent. It asked an injunction and an accounting, and got both; the main question being the *validity of plaintiff's patent.* (35 Fed. Rep. 295). It then sued the Bradley Mfg. Co., a manufacturing concern of which the defendants in the former suit constituted a branch, and sought to enjoin it from manufacturing these articles. It showed that in the first suit the defendant in the second suit had practically conducted the defense, and that the main point decided was the validity of plaintiff's patent. The Court, therefore, simply held in the second suit that this *question of validity* could not be relitigated. In the first case there seems to have been a decree for an accounting, but there was no attempt to collect this out of the defendant in the second case.

Bennett vs. Star Mining Co., 119 Ill., 9, involved simply the question of the validity of a mechanic's lien on real estate. There was no question of personal liability in the case. After the mechanic had brought suit to enforce his lien, and after process had been served on one of the parties in interest, but not on another, a third party bought the property. He came into the litigation, employed counsel and contested the validity of the lien under the names of the parties to the record. In subsequent litigation involving simply the question of the validity of this mechanic's lien, the Court held that this party was bound by the former adjudication *on that question.*

Daskam vs. Ullman, 74 Wis., 474, was a case where an assignee of a note sued the maker. The maker answered that the note had been paid to the assignor before the assignment. The assignor was notified of this defense, and assisted the plaintiff in endeavoring to disprove the plea of payment. Judgment, however, went for the defendant on this issue, and when the assignee subsequently sued the assignor to recover the amount of the note, the Court held that the former adjudication *on the question of payment* was conclusive.

In Palmer vs. Hays, 112 Ind., 289, a party sued under a statute of Indiana to have satisfaction entered of a judgment that had formerly been entered against him, which he claimed had been satisfied. It was shown on the trial that this judgment had once been replevied, and that the replevin bail had brought a suit exactly similar to the present one to have satisfaction entered of that judgment, and that the plaintiff in the present case had really taken charge of that litigation on behalf of the bail, but had been defeated therein on the question of satisfaction. Accordingly, the Court held in the second case that the former adjudication was conclusive *on this question.*

Coats vs. Roberts, 4 Rawle, 112, was a case where a party had been garnisheed to pay money. He denied that he owed

the money to the debtor in the action, but insisted that the debtor had previously assigned the claim on him to a third party, of which he had been notified. And this third party took part in that trial and endeavored to show that he was the owner of the claim, and not the debtor in the action. The Court, however, decided against this contention, and compelled the garnishee to pay the money to the plaintiff in that attachment proceeding. Subsequently this third party, who had claimed to be the assignee of this debt, sued this garnishee to recover the debt, but the Court held that the judgment against the garnishee, under the circumstances heretofore explained, was conclusive evidence in his favor on the question of ownership of the claim, and that he could not be compelled to pay the money twice.

In Van Knoughnet vs. Denny, 68 Hun., 179, a party sued for money loaned and services rendered. His wife took an active part in the prosecution of the suit, and actually furnished the itemized account called for by the defendant, and testified in the case, etc., etc. The plaintiff established his claim as sued for, but defendant established a counter-claim for a larger amount, which was allowed, and judgment was given over for the balance. Subsequently the wife sued this same defendant for certain items of the account included in the previous suit, claiming that they were really due to her and not to the husband. Of course, the Court held that it would be a fraud to permit her to maintain such a claim, after having assisted her husband in establishing the claim on those same items against this defendant, and after he had actually received satisfaction thereof by the allowance of a credit on the defendant's counter-claim.

Stoddard vs. Thompson, 31 Ia., 80, was a case where Thompson sued on a note. Defendant pleaded that Thompson was not the owner of the note, but that one Stoddard was the owner. Stoddard had notice of the suit, and took part in the defense, and tried to establish his ownership. Judgment,

however, went in favor of Thompson. Stoddard then sued to enjoin Thompson from collecting this judgment, on the ground that Stoddard and not Thompson was the real owner of the note. The Court simply held that the record in the former case was conclusive evidence in the second case on the question of the *title to the note.*

Louisville & Nashville Railroad Company vs. Hall, 12 Bush, 131, and Heckman vs. Louisville & Nashville Railroad Company, 85 Ky., 638, cited by the Court of Appeals in its opinion, were simply cases of *misnomer*, where the defendant intended to be sued was simply sued by the wrong name, and where every allegation made in the petition could have been truly made against the real defendant under its proper name. But of course, the case at bar is a wholly different case from that. Plaintiffs alleged in their petition that the Louisville, Cincinnati & Lexington Railway Company made the several contracts sued on, *which was true;* and they manifestly intended to sue this company which was the maker of these contracts. They did not mean to sue the *subsequent purchaser* of the property to which the contracts related. Nor did they connect the purchaser in any way with the transactions, nor make a single averment against it, but *all* of the averments were exclusively and appropriately against the contracting defendant. Hence, there was manifestly no case of misnomer.

Estell vs. Peacock, 44 Mich., 471, (also cited by the Court of Appeals) was where a party sued on a note given for logs. Defendant pleaded failure of consideration because the title to the logs was not in the plaintiff, but in a third party; and the third party undertook to establish this defense and to prove title in himself. The Court simply held that if this should be done and judgment should be given on this issue, it would be conclusive on the question of the *title to the logs* in any subsequent litigation between the plaintiff in that suit and this outside party.

Marsh vs. Smith, 73 Ia., 295, Linton vs. Harris, 78 Ga., 265, Lyon vs. Stanford, 42 N. J. Eq., 411, (15 Stewart), Landis vs. Hamilton, 77 Mo., 555, and Valentine vs. Mahoney, 37 Cal., 389, each involved simply a question of *title to land.* In each of them where the question of title to a particular piece of land was presented for decision, the Court simply held that some adjudication in a former suit wherein that identical question was decided, and in which the parties to the second suit had been heard on that question, was conclusive on that one point of the *title to the land.*

We have thus at some length examined every case referred to by either Court or counsel in the action at bar to show that the question involved in the present case is "frivolous" and is "conclusively settled," except a few cases cited merely by their titles, with the statement that they are "cumulative on the same point"; and we now repeat the statement that no case has been found, or can be found, where a *judgment for money against one person* has been treated as a *judgment for money against an entirely different person.* But, on the contrary, while in some of the very cases cited by counsel for defendant (such as Lovejoy vs. Murray, 3 Wall., and Elliott vs. Hayden, 104 Mass.), such process as that now contended for might have been, and doubtless would have been, used and applied, if it were known to the law, yet this was not done, but an independent suit was brought, in which full *opportunity* was allowed for *any character of defense that might be offered*, whether by way of traverse or confession and avoidance, whether by plea of limitation or accord and satisfaction, or estoppel of any kind, or any character of defense known to the law, and in which cases the former adjudication between different parties was simply used as *conclusive evidence on certain points therein adjudicated.*

2. We have been able to find but one case in which the theory or "doctrine" now attempted to be enforced was ever before suggested; and in that case it was promptly held to

be wholly without precedent and unauthorized. We refer to the case of Bidwell vs. Toledo Consolidated Street Railway Company, 72 Fed. Rep., 10. In this case suit had been brought by plaintiff against the Toledo Consolidated Street Railway Company for an alleged infringement of a patent. After the cause had progressed to a considerable extent, including the making up of the issues and the taking of proof, the complainant made an application for leave to amend its bill and make the General Electric Company, which was a non-resident, a party defendant to the cause. The grounds upon which this application was based and the reason for refusing it are so clearly stated in the opinion of Judge Ricks, and seem to be so directly applicable in principle to the case at bar, that we shall quote quite freely from the opinion. The Court said:

"The complainants have made application to this Court "for leave to amend their bill by making the General "Electric Company, a non-resident corporation, a party "defendant to this suit. It is not claimed that said pro- "posed defendant is within the jurisdiction of the Court, "and amenable to its process, or that it can be brought in "by original subpœna. It is sought to hold it *as a defend-* "*ant in this case* because it is alleged the counsel who are "preparing and conducting the defense for the Toledo "Consolidated Street Railway Company are the general "counsel for said proposed defendant. It is further con- "tended that because said counsel have so assumed the "defense of this case; have furnished witnesses in the em- "ploy of the General Elecrtic Company to testify on "behalf of the defendant; that such witnesses, while so "testifying, have been under salary from the General Elec- "tric Company; and that the latter has in fact agreed to "protect the said The Toledo Consolidated Street Railway "Company in the use of the appliances which it is claimed

"are an infringement of complainants' patent, and that it "will conduct any defense which the said Railway Com- "pany may be called upon to make in Court by reason of "the use of such appliances—*that by such conduct it has, "in legal effect, entered its appearance in the suit.*

"The Court passed upon an application of a somewhat "similar character made in this case some time ago. From "a statement of the facts as above stated, it will be observed "that the Court is now asked to declare that the General "Electric Company, by assuming the defense of this suit, "as alleged, on behalf of the Toledo Consolidated Street "Railway Company has in fact entered its general appear- "ance, and *made itself a defendant in this case*, and is to be "bound by the decree, if one should be made in favor of "the complainants and against the defendant. It is not "claimed that there was any intention on the part of the "General Electric Company to become a party to this case, "or that there is any such desire on its part. It is sought "to make the decree in this case binding upon that cor- "poration because of the acts before stated.

"Is it possible for a Court to make any orders in this "case, under these facts, which would make said corpora- "tion a party defendant in this suit against its wish? "Counsel insist that the Court has authority to make such "an order, and it should be made to promote justice. It is "urgently contended that the plaintiff is now in fact "prosecuting this case against both the Toledo Consolidated "Street Railway Company and the General Electric Com- "pany; that the latter is giving to its vendee and the user "of its electrical appliances the benefit of its great corpor- "ate wealth and influence, and the benefit of the experience "and ability of its counsel; and that if as the result in "such a contest the complainants should prevail, they "should have the benefit of their victory by securing a "decree which would be binding and conclusive upon the

"General Electric Company in any subsequent litigation "that may occur between the parties."

The Court then proceeds to refer to a case which had been cited as authority for such a proceeding, and which case had in terms cited Lovejoy vs. Murray, 3 Wall., 1, and Robbins vs. City of Chicago, 4 Wall., 657, and then said:

"These are the cases relied upon by Judge Shiras to "support his decree in the case cited by complainants' "counsel. They could not have been cited as authority to "support the construction which counsel in this case now "seek to put upon the decision made by Judge Shiras in "the case to which reference has been made. As before "stated, Mast & Co. were not made parties to the suit before "Judge Shiras, and the decree did not undertake to *bind* "*them as a party defendant*, but simply undertook to show "such a state of facts as would tend to estop them in sub-"sequent litigation from again controverting *the issues* "*made in the suit of which they had notice* and in which "they were interested, and in which they participated in "the manner stated.

"It may be that on the final hearing of this case, the "evidence may disclose such conduct on the part of the "General Electric Company—such a participation in the "actual defense of this suit—as will justify the Court in "making a statement of such facts on the face of the "decree, to the end that, in subsequent litigation involving "the same issues or the same interests, the complainants "may have a right to contend that the General Electric "Company is estopped from further defending against the "same. That is as far as the Court went in the case cited "in 41 Federal, 351. . . .

"I am, therefore, of the opinion that as the General "Electric Company is a non-resident corporation, and can

"not be brought into this court by original subpoena, leave "can not be given to amend the bill to make it a party "against its will by reason of the facts hereinbefore "stated. . . .

"The question of whether it has so identified itself "with this case as that it may be hereafter estopped in "subsequent litigation from again defending as to the "issues or interests now involved is a question, as I have "before said, which can only be passed upon at the final "hearing and in the final decree. This is certainly as far "as the Court under any circumstances would have author- "ity to act. I can find no authority for the proposition "that by such action as the General Electric Company has "taken with reference to this case, as hereinbefore stated, "it has made itself (being a non-resident corporation), "against its own intention and wish, *a party defendant in* "*this case*, and thereby conferred upon the Court authority "to make a decree binding and conclusive upon it *as a* "*party defendant*. It may have put itself in a position to "estop it in subsequent litigation as heretofore stated. It "will be proper to determine that question when it arises."

It is true that in the case just cited the General Electric Company was a non-resident, but that was not a material fact, if the principle contended for be true, because a non-resident may voluntarily enter its appearance and *make itself a party* to a cause (if such a thing were in any event possible), just as easily as can a resident. Judge Ricks clearly states exactly what we understand to be the law, viz.: that a person may, by taking part in litigation to which he is not a party, estop himself, under certain circumstances, from denying the matters *adjudged therein;* but he does not thereby make himself a party to the cause, or authorize the Court to make a judgment therein against him personally as a party defendant. The two things are widely different in legal effect. If

suit be brought against such a party, and he makes defense on points which were involved and decided in the former litigation, that former adjudication may be conclusive upon him *on those points;* but he *may have other defenses*, based upon matters personal to him, which were not and could not have been litigated in the former suit, and he, at least, has a *right to be heard* as to whether he has or not. But if he is held as a party defendant to the former judgment, *all defenses are cut off.*

A very clear illustration of this may be supposed in the case of a surety upon a note. Suppose the payee, believing the maker abundantly solvent, and not caring to bother with the surety, sues *the maker alone.* The surety, however, hears of the suit, and may know that as a matter of fact the maker is insolvent, and that at some time an attempt will probably be made to collect the debt off of him (the surety). He, therefore, takes naturally a very lively interest in the suit. The defendant (principal) may plead *non est factum*, or no consideration, or a vicious consideration. The surety knows that if any of these defenses shall prevail it will certainly release him. He, therefore, seeks to establish them, may possibly testify in support of them, and practically takes charge of the defense. But judgment goes for plaintiff against the principal. Execution is returned "no property found." He then sues the surety. The surety pleads (1) *non est factum* as to the principal; (2) *non est factum* as to himself; (3) vicious consideration; (4) some matter of estoppel between himself and the payee; (5) limitation. Now, upon the *first* and *third* points, possibly the former adjudication might bind the surety, but surely he would not be thereby precluded from making his *second*, *fourth* and *fifth* points. Yet, if that judgment is treated as a judgment against him personally, *all his defenses* are thereby cut off. The foregoing is merely a simple *illustration of the difference* between holding a judgment to be conclusive *evidence of certain facts*

against a party, and holding it to be a judgment against him as *a defendant in the judgment.*

Neither can it ever be assumed that the person could not possibly have any other defense against his personal liability than such as was made in the action already tried. *He has a right to be heard on this question.* It can not be presumed that he has *no defense;* nor can it be *prescribed what his defenses may be;* though it may be known that as to *certain defenses* he is *concluded.*

The case of Rees vs. Watertown, 19 Wall., 107, is very suggestive and instructive in this immediate connection. Rees was the holder of bonds issued by the City of Watertown. He brought suit against the city and obtained judgment and a return of "no property found." He then brought suit for mandamus to compel the levy of a tax to pay the judgment. He had three writs of mandamus issued; but each of them was evaded by resignation of the officials of the town. The matter was necessarily one of great publicity. Every one knew of it. Rees then brought suit in equity against the city showing these facts, and insisting that the corporate authorities were trustees for creditors; that the property of the citizens was a trust fund to pay the debts of the city; and asking that the Court enter a decree subjecting *the individual property of the citizens;* that it direct the marshal to report the property to the Court "*where any objections should be heard;*" that the amount of the debt be apportioned among the several owners of property; and that the marshall be then directed to collect these several amounts, or in default of payment sell the property. The Court refused the relief sought, and said that to grant it would be *to take property without due process of law.* In the course of its opinion it said:

"A court of equity can not, by avowing that there is a "right, but no remedy known to the law, *create a remedy*

"*in violation of law*, or even *without the authority of law.* "*It acts upon established principles not only, but through* "*established channels.* Thus assume that the plaintiff is "entitled to the payment of his judgment, and that the "defendant neglects its duty in refusing to raise the "amount by taxation, it does not follow that this Court "may order the amount to be made from the private estate "of one of its citizens. This summary proceeding would "involve a violation of the rights of the latter. He has "never been heard in court. He has had no opportunity "to establish a defense to the debt itself, or if the judg- "ment is valid, to show that his property is not liable to "its payment. . . . The proceeding supposed would "violate that fundamental principle contained in Chapter "29 of Magna Charta, and embodied in the Constitution of "the United States, that no man shall be deprived of his "property without due process of law—that is, he must be "served with notice of the proceeding and have a day in "court to make his defense.

"Due process of law undoubtedly means in the due "course of legal proceedings, according to those rules and "forms which have been established for the protection of "private rights. . . . *Whether in fact the individual* "*has a defense to the debt, or by way of exemption, or is* "*without defense, is not important. To assume that he has* "*none, and, therefore, that he is entitled to no day in court,* "*is to assume against him the very point he may wish to* "*contest.*" (pp. 122, 123.)

3. Now let us consider the facts of the case at bar and apply some of the principles we have been considering.

As we have already noted there was no claim of a lien upon any tangible property in the case at bar, and no attempt by either an attachment or by a receiver to get possession or control of any specific fund. The prayer in the petition that

defendant be required to pay into Court the earnings, upon which a lien was claimed, was simply a prayer for *final decree to that effect*, not an attempt to have the receipts from the property paid into Court from month to month during the litigation, and no attempt was ever made to have such a thing done. Pending the litigation the possession of the property was left undisturbed, with the right in the possessor to collect and use the earnings thereof. Plaintiffs simply trusted to the *personal ability of the defendant* to respond at the end of the litigation to any judgment that might be entered ordering it to *pay money*.

And when the judgment was entered it was simply an order to pay money into Court. It recited that the Commissioner's report showed $60,192.27 of earnings, but that defendant was entitled to a credit of $6,626.05, and therefore ordered that "the balance of $53,562.62" be paid into Court. It is true of course, that this was the amount of "earnings" which the Court held that defendant, the Louisville, Cincinnati & Lexington Railway Company, had received; and its liability to pay this amount into Court grew out of this fact; yet the thing ordered to be paid into Court was simply *money*, the amount of a balance of an account beginning back in 1882, twelve years before this order was made and three years before even the suit was begun; and in fact the account made by this report *closed in 1890*, four years before this order was made. The money which had from time to time during all these years from 1882 to 1890 been received from the operation of the road, or from carrying any specific freight or passengers, had no earmarks; and if any part of it was on hand in 1890 when the account in the report closed, even that was, of course, not on hand in 1894, when the order to pay was entered.

In other words, it was simply a *judgment for money*, operating purely *in personam*—in Kentucky all "final orders," whether in equity or at law, are by statute designated "judg-

ments;" there are no "decrees" *eo nomine*---and its enforcement was attempted in what was originally the sole means of enforcing such decrees in equity, viz., by rule or other process of contempt.

In Daniell's Chancery Pleading and Practice (5th Ed., Vol. 2, Ch. 26, Sec. VI, side page 1032), the author says:

"'Formerly a decree in a court of equity, unless it was "'for land, operated only *in personam;* and the only "'method of enforcing it was by what is termed process of "'contempt, against the party disobeying it.'"

And again (Sec. VII, side page 1042):

"'All decrees and orders may, as we have seen, be en-"'forced by process of contempt. Such as direct pay-"'ment of a sum of money or costs may *also* be enforced, "'under the Act considered in the last section, by writs of "'*fieri facias* and *elegit.*'"

In Kentucky it is provided by statute that:

"A final order or judgment for money, lands or other "specific things, may be enforced by any appropriate "writ of execution *allowable on a judgment at law*, ac-"cording to the nature of the case.

"Such writs shall issue and be returnable as other "writs of execution.

"*Nothing in this article shall prevent any party from "proceeding to carry an order or judgment of Court into "execution according to the ancient practice of Courts of "Chancery.*" (Ky. Statutes, Sec. 1663.)

Accordingly, after the judgment was entered for the payment of this money, the Court proceeded, as it had the right

to do, to endeavor to enforce it by a rule to pay. And it might, if it had seen fit, have ordered an execution of *fieri facias* (which only issues on judgments *in personam*) to issue upon it. If it could possibly need any authority to establish such a proposition, the last opinion delivered by the Court of Appeals in the case at bar furnishes it, for the Court there says: "The proceeding to compel the payment of the fund into Court by the appellant company is essentially personal against it, and a judgment, to be enforced by rule, directing appellant to pay the amount of the judgment into Court, is, in our opinion, *essentially a personal judgment*, upon which the Court might have ordered execution to issue." It is true the Court is here speaking of the order directing the Louisville & Nashville Railroad Company to pay the money into Court; but surely, if an order directing the Louisville & Nashville Railroad Company to pay the money into Court was "essentially a personal judgment," then the order directing the Louisville, Cincinnati & Lexington Railway Company to pay the same into Court was likewise "essentially a personal judgment."

The case then comes to this, as we have said before, a judgment which is "essentially a personal judgment" against the Louisville, Cincinnati & Lexington Railway Company, the sole defendant in the cause, is enforced by rule—the ancient chancery mode of enforcing personal judgments—as a personal judgment against a totally different person, who is not even a party to the record. It is not used merely as conclusive evidence against him on the points *therein adjudicated;* but is enforced by rule as if it were in itself a personal judgment against him, thus cutting off *all defenses.*

4. It is not claimed that any statute attempts to authorize this procedure. It is purely the Court's invention in this solitary case. And we submit that the fact that during all the ages in which courts have been administering justice, in equity and at law, such a thing was never done

before, though equal opportunity has offered in countless cases, is very persuasive, if not entirely conclusive, that the great lawyers who have gone before us, who have made the law what it is, who, by their precept and their practice, have fixed and established the principles by which courts act, have never recognized in a proceeding such as this "due process of law," and that *it is not such.*

In Rees vs. Watertown, 19 Wall., 107–122, the Court, in speaking of judicial procedure, and quoting language of the Court of Appeals of New York, said:

> "Due process of law (it is said) undoubtedly means in "the due course of legal proceedings, according to those "rules and forms which have been established for the pro- "tection of private rights."

In Pennoyer vs. Neff, 95 U. S., 714–733, in speaking of due process of law, the Court said:

> "Whatever difficulty may be experienced in giving to "those terms a definition which will embrace every possi- "ble exertion of power affecting private rights, and exclude "such as is forbidden, there can be no doubt of their "meaning when applied to judicial proceedings. *They "then mean a course of legal proceedings according to those "rules and principles which have been established in our "system of jurisprudence for the protection and enforce- "ment of private rights.* To give such proceedings any "validity, there must be a tribunal competent by its con- "stitution—that is, by the law of its creation—to pass "upon the subject matter of the suit; and if that involves "merely a determination of the personal liability of the "defendant, he must be brought within its jurisdiction by "service of process within the State, or his voluntary "appearance."

By the term "voluntary appearance" here used by the Court, it manifestly meant appearance of record by a person who is named as a party to the record; for this is the universally recognized meaning of the term "appearance." The Court doubtless did not imagine that a case would ever arise where a Court would attempt to treat a personal judgment against a particular person, named in the record, as a personal judgment against a different person who was not named in the record.

In the late case of Holden vs. Hardy, 169 U. S., 366–390, this Court, through Mr. Justice Brown, said:

"What shall constitute due process of law was perhaps "as well stated by Mr. Justice Curtis in Murray's Lessees "vs. Hoboken Land Co., 18 Howard, 272–276, as anywhere. "He said: 'The constitution contains no description of "'those processes which it was intended to allow or for-"'bid. It does not even declare what principles are to be "'applied to ascertain whether it be due process. It is "'manifest that it was not left to the legislative power to "'enact any process which might be devised. The article "'is a restraint on the legislative as well as on the execu-"'tive and judicial powers of the government, and can "'not be so construed as to leave Congress free to make "'any process due process of law by its mere will. To "'what principles then are we to resort to ascertain whether "'this process, enacted by Congress is due process? To "'this the answer must be twofold; we must examine the "'Constitution itself to see whether this process be in con-"'flict with any of its provisions. If not found to be so, "'we must look to those settled usages and modes of "'proceeding existing in the common and statute law of "'England, before the immigration of our ancestors, and "'which are shown not to have been unsuited to their "'civil and political condition by having been acted on by "'them after the settlement of this country.'"

Every definition that can be found of "due process of law" involves the idea of some course that has been *established*, it may be by statute or it may be by usage. The very idea of *law* itself involves the conception of "a *rule*, not a transient sudden order from a superior to a particular person; but something permanent, uniform and universal." And it involves the conception of "a rule *prescribed*," that the people who are to be controlled by it may be notified of it. "But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be . . . by writing, printing, or the like, which is the general course taken with all our Acts of Parliament." (1 Blackstone, 44-46). And it is this conception of law that enters into the definitions or descriptions of "*due* process of *law*" which this Court has given, as applied to judicial proceedings, such as "a course of legal proceedings *according to those rules and principles which have been established* in our system of jurisprudence." (Pennoyer vs. Neff, 95 U. S. 733).

With this conception of law we can not believe that in an action against a single defendant, wherein a judgment for payment of money has been entered against him, a rule afterwards issued therein *against another*, who is not a defendant, to show cause why he should not be *considered as a defendant* and be *compelled to pay the judgment*, is "due process of law."

5. It is claimed that due process of law simply involves the essential elements of (1) notice, (2) hearing, (3) judgment; and that if these elements are present it matters not how extraordinary are the proceedings or the result. But this is not true. Possibly the language of some of the earlier cases might give at least color to this contention. But in the late case of Chicago, Burlington, &c. R. R. Co. vs. Chicago, 166 U. S., 234, the Court said: "Nor is the con-

tention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in Court, and was admitted to make defense."

What character of notice did the Louisville & Nashville Railroad Company ever have, and what character of hearing? It never had notice of any claim that *it* was liable to plaintiffs for the amount of these earnings, or that a demand was being made upon *it* for the amount thereof. Counsel insist in effect that it knew plaintiffs wanted to get this money from somebody, and it *ought to* have come into Court and filed an answer and told plaintiffs the exact facts, and made defense, assuming that plaintiffs would have sued it, if they had known the facts. But, in the first place, plaintiffs *did know the facts*, as the response shows; and, in the second place, the law imposes no such obligation on any one. In Pennoyer vs. Neff 95 U. S., 728, the Court quotes with approval the language of Webster vs. Reid, 11 How., that "*no person is required to answer in a suit on whom process has not been served, or whose property has not been attached.*"

After the final judgment had been entered against another, the Louisville & Nashville Railroad Company then had notice that it was claimed to be a party defendant to that judgment, and that it was proceeded against *as such.* And it had a hearing upon *that question*, and *that question only.* But that was not a hearing *upon its liability to plaintiffs;* for if it was a party defendant to that judgment then this question was foreclosed, and it would be given no opportunity to make defense of any kind against the demand of plaintiffs upon it.

But it is said it was giving a hearing upon the question of whether or not the preceding judgment was a judgment against it, and the Court held it was, and that this must be

the end of the matter. *This we utterly deny.* This would be in effect to hold that the judgment of the State Court, to the effect that we have had due process of law, is final and conclusive; which, of course, can not be true, and is not true, as this Court has held.

In Scott vs. McNeal, 154 United States, 34, it appears that Scott had disappeared from home. After an absence of seven years, without his being heard from, some relative applied to the Probate Court, in the State of Washington, in the county where he had resided, to have an administrator appointed, on the ground that he was dead. The Probate Court heard the evidence, held that he was dead, and appointed an administrator. This administrator applied to the Court for authority to sell Scott's real estate, and after formal proceedings, as authorized by statute, the order was entered as sought. The administrator then sold to a certain purchaser, who in turn sold to McNeal. Deeds were passed and the purchase money paid. Scott afterwards returned and brought an action of ejectment against McNeal to recover his land. McNeal defended behind the probate proceedings. He contended that granting letters of administration is "*in the nature of a proceeding in rem;*" that "*public policy* and necessity" required that rights depending upon the death of persons long absent should be settled; that a man is responsible for the natural consequences of his acts; that these probate proceedings were the natural consequences of Scott's acts, and that he was therefore *estopped* to complain of them and take this property back. How familiar all that sounds to one who has read the briefs of the present defendants in error!

On the other hand, Scott contended that the proceedings were not binding upon him, and "that to give effect to the probate proceedings, under the circumstances, would be to deprive him of his property without due process of law." There was a trial. The trial Court held that the probate

Court had jurisdiction to try the very question it did try; that its proceedings were not void; that title passed under them; and it instructed the jury to find for defendant McNeal in the ejectment suit. Scott appealed to the Supreme Court of Washington. It likewise held the proceedings of the probate Court valid, saying, "*The proceeding is substantially in rem*"; and therefore affirmed the judgment in the ejectment suit. (5 Wash. St. 309.) Thus Scott had had a full and fair trial in the State Court on the question of whether or not he was bound by the judgment of the Probate Court; and the State Court had held that it was "substantially *in rem*" and he was bound by it. He then sued out a writ of error from this Court. This Court did not accept the judgment of the State Court as conclusive upon this question, and therefore did not dismiss the writ, or affirm the judgment, but it *reversed* the judgment, and held that the probate proceedings were *not* binding on Scott, and that he *had been* deprived of his property without due process of law.

Just in this connection we may notice counsel's argument that the Court of Appeals in the case at bar simply applied to the Louisville & Nashville Railroad Company "the doctrine of estoppel." Of course this can be said *in every case where a Court enforces or gives effect to a judgment.* The doctrine of "*res adjudicata*" is but a branch of the doctrine of estoppel. Still this Court has a right to inquire, as it did in Scott vs. McNeal, whether or not the *alleged* judgment was *in reality* a judgment against the party complaining.

In the case at bar the Court held that the judgment entered in June, 1894, against the Louisville, Cincinnati & Lexington Railway Company (Abstract 15), was a *valid and enforcible judgment against the Louisville & Nashville Railway Company*, though the latter insists it was not before the Court. It is of that decision we now complain; and it is not conclusive on this Court, as the case just cited shows.

In the case last cited (Scott vs. McNeal) the probate proceedings had been under statute, and the State Court had necessarily passed on the validity and effect of that statute; *but this Court held that it was not bound thereby, when called on to exercise its jurisdiction under the fourteenth amendment of the Constitution of the United States;* and, on this subject, coming to the merits, the Court quoted and reaffirmed the principles announced in the language of Mr. Justice Field, heretofore quoted in Pennoyer vs. Neff, 95 United States, 733, that the words "due process of law" in *judicial* proceedings "mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights," and that if the proceeding involve a determination of the *personal liability* of the defendant, "he must be brought within its jurisdiction *by service of process within the State, or his voluntary appearance;*" and, as heretofore said, the Court manifestly used the expression "appearance" in its legal sense, as courts and lawyers understand it, viz.: An appearance of record entered by a person who has been made a defendant to the cause. It has been the settled law of Kentucky for over seventy years, that even where the *record* purports to show that a person appeared in the cause, this does not make him a party or give the Court jurisdiction over him, if he is not named as a party in the petition or process. (Plummer vs. Crain, 5 T. B. Mon., 378.)

6. In Pennoyer vs. Neff, *supra*, is a consideration of a proposition which has a very strong bearing on one announced by the Court of Appeals in the case at bar, in its opinion of January 14, 1898, and which the Court really makes a fundamental proposition of the case. It said:

> "If the Louisville & Nashville Railroad Company is *a* "*party*, it is so because it has, as assignee of the contract "and owner of the property, *obtained the net earnings and* "*conducted the defense of this suit.*" (Abstract 66.)

Thus the Court recognizes that merely defending the suit could not make the Louisville & Nashville a defendant and give the Court *jurisdiction over it;* but it says that if, in addition to this, it "*obtained the net earnings*"—a fact having no connection at all with the Court proceedings, and one to be determined by extraneous investigation subsequent to the judgment—then it was *a party to the suit* and the Court had *jurisdiction over it.* But if, on investigation it shall turn out, that it *did not obtain the net earnings*, then it is *not a party* to the suit, and the Court *did not have jurisdiction over it.* To our minds this proposition is legally and logically incomprehensible. We can understand how the receipt or non-receipt of such net earnings has a most material bearing on the original question of the liability or non-liability of the company to plaintiffs' demand; but what bearing such question of receipt or non-receipt of net earnings of a railroad can have on the question of whether or not the company is *a party to this suit* is to us absolutely incomprehensible.

As said above, part of the opinion in Pennoyer vs. Neff (95 U. S.) has a decided bearing in this immediate connection. There a non-resident defendant had been proceeded against merely by *constructive service* of process, and a personal judgment for money had been given against him under express authority of a State statute. On this judgment execution issued and was levied on his land in the State. It was sold, and the purchaser put into possession. The party thus proceeded against, then returned and sued the purchaser in ejectment to recover his land. The purchaser, of course, defended under the proceedings mentioned, and argued that they should be held valid, because, while the defendant was not personally before the Court, yet it was manifest from subsequent developments that he had *land* in the State, and that as the statute might have authorized, and in fact did authorize, such land to be seized under attachment *at the beginning* of the action, although on constructive service of process only, there was

no substantial reason why a judgment personal in form might not be entered, and execution issued, and, if land was found to be levied on, then be treated as held under a valid seizure—that this was a mere "question of procedure," and, as the statute authorized it, it should be upheld. This reasoning was quite plausible; and in fact it captured one member of the Court, Mr. Justice Hunt; but all the other members, speaking through Mr. Justice Field, said:

> "But the answer to this position has already been "given in the statement that the jurisdiction of the Court "to inquire into and determine his obligations at all is "only incidental to its jurisdiction over the property. *Its* "*jurisdiction in that respect can not be made to depend upon* "*facts to be ascertained after it has tried the cause and ren-* "*dered the judgment.* If the judgment be previously "void, it will not become valid by the subsequent discov- "ery of property of the defendant, or by his subsequent "acquisition of it. The judgment, if void, when rendered, "will always remain void; *it can not occupy the doubtful* "*position of being valid if property be found, and void if* "*there be none. . . . This doctrine would introduce a* "*new element of uncertainty in judicial proceedings.*" (Page 728.)

So in the case at bar we say that the question of whether or not the Court had jurisdiction in 1894 to render a judgment against the Louisville & Nashville Railroad Company—which, by the way, it did not even purport to do—can not be made to depend upon facts *inquired into four years afterward*, viz., as to whether it did or did not receive certain net earnings of a railroad. If the Court did not intend it to be, and did not make it, a judgment against the Louisville & Nashville Railroad Company, *when it was rendered*, it could not be made such four years afterward upon allegation

or determination of facts not appearing when the judgment was rendered.

We may concede for the purpose of argument, and as not necessary now to be determined, that the conduct of the Louisville and Nashville Railroad Company in connection with this suit prior to the rendition of the judgment of 1894 against the Louisville, Cincinnati and Lexington Railway Company, may have been such that, if it should be sued by plaintiffs, that judgment would be *conclusive evidence against it on certain points adjudicated therein*, as, for example, on the question, so bitterly contested, as to whether the contract covered the earnings on business going both ways or only one way, and on the question of the amount of such earnings. But we do most confidently submit that the Louisville and Nashville Railroad Company *was not in 1894 a party to this cause;* that the Court did not have jurisdiction to render a judgment ordering it to pay money into court; that the Court did not know it was doing so, that it did not purport to do so, and did not in fact do so; and that the judgment of 1894 is *therefore not a judgment against the Louisville and Nashville Railroad Company, and can not be enforced as such.* And with equal confidence we submit that the Court can not presume, conclusively or otherwise, that if the Louisville and Nashville Railroad Company should be sued by plaintiffs on their demand, it would or could have no defense, or no defense other than those points adjudicated in this suit against the Louisville, Cincinnati and Lexington Railway Company. As to whether or not it has such defense or defenses, is, in the language of this Court in Rees vs. Watertown, "*not important. To assume that he has none, and therefore that he is entitled to no day in court, is to assume against him the very point he may wish to contest.*" We, therefore, submit that by the action of the Court (if allowed to stand), in treating the judgment in this cause as a judgment against the Louisville and Nashville Railroad Company, and ordering

it to pay the same, it will be deprived of its property without due process of law.

7. Counsel say the Louisville & Nashville Railroad Company pleaded to the merits as to the original question of its liability to plaintiffs, when it filed its response, and that the Court decided against it on such plea. *This is entirely a mistake.* No such plea was made, nor would such a plea have been received; for the only question sought to be determined on that proceeding was as to whether or not the respondent was a party to the judgment theretofore entered, and hence compellable to pay it—not the question of respondents' original liability to plaintiffs. In support of his statement that a plea to the merits was filed counsel quote two disconnected sentences in the fourth paragraph of the response, and argue that the respondent meant thereby to submit that it was not liable to plaintiffs, because the maker of the lease to the respondent had never consented to the assignment of that lease to the respondent. But such was not the purpose of the allegation referred to, and neither the Circuit Court nor the Court of Appeals treated it as such, though each of these courts delivered a written opinion on the subject of this response. The words quoted are a portion of the fourth paragraph of the response, and that whole paragraph was intended simply to show, as is manifest from reading it, that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser, to show the time and circumstances under which it purchased, and plaintiff's knowledge thereof, and the continued existence of the Louisville, Cincinnati & Lexington Railway Company, by way of suggesting the theory upon which plaintiffs themselves had proceeded in suing the Louisville, Cincinnati & Lexington Railway Company, instead of suing the Louisville & Nashville Railroad Company.

As for the statement in the brief that "the Court held the response on the merits insufficient" it will be seen, as

suggested above, that both the Circuit Court and the Court of Appeals delivered written opinions on the subject of that response in which *each Court purports to state the substance of the response* (Abstract 52 and 68,) *and yet neither Court even alludes, directly or indirectly, to the language which counsel now quote*, and which they say was presented as a plea to the merits. No such question as that now suggested was considered or decided. That the respondent certainly did not *mean* by the response to present any matter going to the merits of the original question of liability is conclusively shown by the preceding language of the response in which it says:

> "If the plaiutiff should be required, in the usual and "orderly way, to institute a suit against this respondent to "hold it liable for plaintiff's alleged claim, this respondent "has, and could and would present good, valid, and sub-"sisting defenses thereto." (Abstract 50.)

These defenses were not presented, however, because the very nature of the proceeding was such as to exclude them, as it was a proceeding, not to determine the question of respondents' original liability to plaintiffs, but to enforce satisfaction of the judgment as if it were a judgment against respondent. And in such a proceeding it was neither requisite nor permissible for respondent to show what defenses it had to the original demand of plaintiffs, if such demand should be made against it. Hence no attempt at such showing was made.

8. It is not necessary to refer to the class of cases involving *lis pendens* purchasers. Whatever rights the Louisville & Nashville Railroad Company acquired in connection with any property referred to in the course of this litigation were, as we have seen, acquired several years prior to the institution of this suit, under a conveyance which was duly

recorded, and of which plaintiffs not only had notice, but *actual knowledge*, at the time this suit was instituted, as the response shows. It is manifest, therefore, that the judgment in this cause could not bind it as a *lis pendens* purchaser. (Dull vs. Blackman, 169 United States, 243–248.)

In this connection, however, it may be well to refer to the case of Iowa Central Railway Co. vs. Iowa, 160 United States, 389, on account of the prominence given to it in the briefs of counsel for defendants in error. It there appeared that a suit was brought at the instance of the people of a certain community, against the Central Iowa Railway Co. to compel obedience by it to an order of the Railway Commissioners of the State requiring it to operate a certain portion of its road. In due time a judgment was entered ordering the operation as prayed for. Thereupon an appeal was taken to the Supreme Court of Iowa. *After the entry of the judgment by the Court of original jurisdiction* requiring the operation of the road, and while the appeal was pending in the Supreme Court, foreclosure proceedings were begun against the Railway Company; and in course of time the mortgage was foreclosed and the property sold, which sale took place just a month before the judgment of affirmance in the Supreme Court of Iowa. All the proceedings in the foreclosure case had taken place after the judgment of the lower Court, and pending the appeal in the Supreme Court. There were one or two conveyances after this judicial sale, and the property soon came into the hands of a corporation evidently organized for the purpose of taking the property, and which was called the Iowa Central Railway Company. It paid no attention to the order for operation of the road; and thereupon the Attorney General filed in the Supreme Court of Iowa a petition for a mandatory injunction against this new corporation as the successor, assignee and grantee of the original defendant, the Central Iowa Railway Company, praying that it might be compelled to obey the mandate and

order of Court. To that petition an answer was filed by the Iowa Central Railway Company, denying in a qualified manner that it was the successor, assignee or grantee of the original defendant, but stating facts which clearly showed that it was such. Thereupon the Attorney General moved for a judgment on the petition and answer on the ground that the answer presented no defense at all. The Supreme Court sustained this motion, delivering a written opinion which is shown in the record in that cause on file in this Court, in which it pointed out that the decree in the original cause expressly ran against "the Central Iowa Railway Company, its officers, agents and servants, its *successors*, *assigns*, *lessees*, and each and every thereof;" and that while there was a qualified denial by the new corporation that it was such successor, assignee or grantee, yet the facts alleged showed beyond a doubt that it was such; and that it was therefore bound by the decree. It is difficult to see how there could be any doubt about the validity of the proceeding in question. The Iowa Central Railway Company, however, sued out a writ of error from this Court, which afterwards dismissed the writ.

The manner of attempting to raise the Federal question, as set forth in this Court's opinion, would seem to have been sufficient of itself to justify the dismissal of the writ. The Court says:

> "Nowhere in the answer or in the amendments to the "answer filed on behalf of the company was it claimed "that the proceeding was violative of the Constitution of "the United States, or assailed any right, title, privilege "or immunity specially set up or claimed under that con- "stitution. Indeed there was no mention of any right "thereunder *until the filing of a brief* for defendant en- "titled 'Defendant's resistance and objection to plaintiff's "motion to enter order prayed for in the petition,' in the

"ninth clause whereof it was claimed that it would be a vio-
"lation of the fourteenth amendment of the Constitution of
"the United States to grant the order prayed for upon the
"motion in question."

The argument of the counsel for plaintiff in error, as appears from his brief on file, was devoted in the first place to an elaborate examination and quotation of various statutory provisions in the Code of Iowa relating to actions of mandamus, which he contended had not been observed, a question with which, of course, this Court had nothing to do. He also argued that it was improper for the Court to sustain a *motion for a judgment* simply on the petition and answer, but that the Attorney-General *ought to have demurred to the answer.* He also insisted that his client was entitled to a jury trial, a question which, of course, has no application to the case at bar. The Court does, in its opinion, speak of what constitutes due process of law, but the view which it took as to what was the real question submitted to it for decision, is clearly stated in the following paragraph near the close of the opinion:

"It is manifest that it was never contemplated by the
"framers of the Constitution that this Court should sit in
"review, as an Appellate Court, of such a question as that
"presented by the record in the case at bar, to-wit:
"*Whether or not the highest Court of a State erred in*
"*holding that it could rightfully determine from the state-*
"*ments in the pleadings, filed by both parties to a contro-*
"*versy pending before it, that the averments of an answer*
"*set forth no defense to the claim of the plaintiff.*"

It seems to us that the State Court in its opinion showed beyond possible doubt from the answer of the defendant that it was the successor and grantee of the original defendant

under a purchase actually made after the original decree was entered, and that it was unquestionably bound by it. And as to the question of practice, as to whether a Court could enter judgment for the plaintiff because the answer presented no defense, without first requiring a demurrer to be filed to the answer, this was so manifestly within the power of the Court, and it was so entirely plain that this presented no federal question, that it seems to us it could have presented no ground for serious dispute.

9. Before concluding, we desire to notice one fact in the record which counsel for defendants in error make prominent in their briefs, but which we have not heretofore noticed, because we could not do so without making a break in the statement or argument of more important matters. During the course of this long litigation there was a change of counsel for the defendant. Former counsel desired their names stricken from the record as counsel. They asked us to accept notice of a motion to that effect. We did so. If we had not done so, it would have been served upon us. It seems—though we did not notice it at the time—that the notice read: "The Louisville & Nashville Railroad Company will take notice that on Monday, April 20, 1891, at the motion hour we will move the Court to strike our names from the record herein as attorneys for said Railroad Company;" and, as there could, of course, be no objection to counsel striking their names from the record, the order was entered, and followed the language of the notice. (Rec. 79-80). We did not notice this; we regarded it as purely a formal matter, a step which counsel had the right to take, and we did not scrutinize it closely. But what does it all amount to? Retiring counsel could not, by such a Parthian dart, shoot into a cause a person not therefore a party, by giving notice to strike their "names from the record as attorneys for such" person, nor by having the Court enter an order to that effect, when the record did not show such person to be a party, nor

these counsel to be its attorneys. *Their names could not be stricken from the record as attorneys for a certain person, when their names did not appear on the record as attorneys for that person.* Of course, the retiring counsel did not mean to inject this stranger into the record, and it is perfectly plain that they did not in fact do so. It was simply a manifest clerical error which corrects itself.

We respectfully ask that the motion to dismiss or affirm be overruled.

JAMES P. HELM,
HELM BRUCE,
Counsel for Plaintiff in Error.

March 27, 1899.

AUTHORITIES CITED AND REVIEWED.

MOTION TO DISMISS.

Rev. Stats. of U. S., Sec. 709.
C. B. & Q. R. Co. vs. Chicago., 166 U. S., 226.
Murray's Lessee vs. Hoboken Land, &c. Co., 18 How., 272, 276.
Davidson vs. New Orleans, 96 U. S., 97, 112.

MOTION TO AFFIRM.

Lovejoy vs. Murray, 3 Wall., 18.
Elliott vs. Hayden, 104 Mass., 180.
Eagle Mfg. Co. vs. Bradley Mfg. Co., 50 Fed. Rep., 193.
Bennett vs. Star Mining Co., 119 Ill., 9.
Daskam vs. Ullman, 74 Wis., 474.
Palmer vs. Hays, 112 Ind., 289.
Coats vs. Roberts, 4 Rawle, 112.
Van Knoughnet vs. Denny, 68 Hun., 179.
L. & N. R. R. Co. vs. Hall, 12 Bush, 131.
Heckman vs. L. & N. R. R. Co., 85 Ky., 638.
Estell vs. Peacock, 44 Mich., 471.
Marsh vs. Smith, 73 Iowa, 295.
Linton vs. Harris, 78 Ga., 265.
Lyon vs. Stanford, 42 N. J. E., 411 (15 Stewart).
Landis vs. Hamilton, 77 Mo., 555.
Valentine vs. Mahoney, 37 Cal., 389.
Bidwell vs. Toledo Con. Street R'y Co., 72 Fed. Rep., 10.
Robbins vs. City of Chicago, 4 Wall., 657.
Daniel's Chan. Pl. & Prac. (5 Ed., Vol. 2, Ch. 26, Sec. VI, side page 1032.)
Kentucky Statutes, Section 1663.
Rees vs. Waterton, 19 Wall, 107, 122.
Pennoyer vs. Neff, 95 U. S., 714, 733.
Holden vs. Hardy, 168 U. S., 366, 390.
1 Blackstone, 44, 46.
Scott vs. McNeal, 154 U. S., 34.
Plummer vs. Crain, 5 T. B. Mon., 378.
Dull vs. Blackman, 169 U. S., 243, 248.
Iowa Central R'y Co. vs. Iowa, 160 U. S., 389.

No. 178.

FEB 23 1900

JAMES H. MCKENNEY, Clerk

Supreme Court of the United States.

Filed Feb. 23, 1900.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - Plaintiff in Error,

vs.

A. L. SCHMIDT, TRUSTEE, et al., - Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES P. HELM,
HELM BRUCE,
Counsel for Plaintiff in Error.

E. W. BRUCE,
Of Counsel.

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Plaintiff in Error,*

vs.

A. L. SCHMIDT, Trustee, *et al*, - - *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

QUESTION.

The question involved in this case is simply this: Where a personal judgment is entered against A. B. for a specified sum of money, can an execution, or a rule to pay same, be issued thereon against C. D., who is not named in the judgment, and is not even a party to the cause? And if this is done, and C. D.'s property is taken to satisfy the judgment, is this "due process of law?"

This question arises out of the following

FACTS.

Before beginning the statement of facts a word of explanation is necessary as to the record. It contains much which we consider immaterial to the federal question, but while we made an agreement with defendant in error

(Rec., 317) by which a great mass of matter in the State Court record was omitted from this one, yet defendant in error was not willing to omit any more. When the motion to dismiss or affirm was heard we had an "Abstract of Record" printed for convenience, containing what we considered, and still consider, the material portions of the record, which is of course still before the Court. But as defendant in error relies on matters not in the abstract, we are thus compelled to refer to them. The opinions of the Court of Appeals, of which there are several, were omitted from the original record, under an agreement that the published opinions should be considered parts of the record as if copied therein. (Rec., 319.) But we have printed them in the Abstract for convenience of reference.

With this explanation of the record we now proceed with the statement of facts.

By an instrument dated July 2, 1879, the Northern Division of the Cumberland & Ohio Railroad Company (hereinafter called the "Cumberland & Ohio") executed a mortgage to Joshua F. Speed, Trustee, to secure a proposed issue of $350,000 of bonds. (Rec., 14.) The amount of the bonds was afterwards reduced to $250,000.

By an instrument dated July 28, 1879, this same Cumberland & Ohio leased its road for thirty years to the Louisville, Cincinnati & Lexington Railway Company. In this lease the execution of the mortgage just mentioned was recited, and the lessee agreed that if the earnings of the leased line should prove insufficient to pay the interest and provide a sinking fund for the payment of the principal of the lessor's aforesaid mortgage bonds, then the lessee (the Louisville, Cincinnati & Lexington Railway Company) would "supply the deficiency, so far as it may be done, by appropriating *the net earnings*, or so much as may be needed, *on*

its own lines, which may accrue by reason of business coming to it from or over said first party's line" (the leased line.) (Rec., 20.)

Contemporaneously with the execution of this lease the lessee, the Louisville, Cincinnati & Lexington Railway Company, executed to Joshua F. Speed (who was also trustee under the lessor's mortgage) a mortgage of net earnings on its own line arising out of business derived from the leased line, the contracting portion of which, following various recitals, is as follows, viz.:

"Now, in consideration of one dollar cash in hand "paid by said second party to said first party, and the "premises, the said first party has this day and does hereby "mortgage and put in lien all net earnings which may "accrue to it by reason of business coming to it from or "over said lines of the Northern Division of the Cumber- "land & Ohio Railroad Company to the said Joshua F. "Speed, as trustee aforesaid (who is the trustee for the "mortgage made by said Northern Division of the Cum- "berland & Ohio Railroad Company to secure said three "hundred and fifty bonds of one thousand dollars each): "Conditioned, that if the net earnings of said leased "premises do not prove sufficient to pay the interest and "provide for the sinking fund of said mortgage bonds, "then said first party, if all other sources of raising money "of said Northern Division of the Cumberland & Ohio "Railroad Company prove insufficient, will supply the "deficiency, so far as it may be done, by appropriating and "paying over promptly the net earnings, or so much "thereof as may be needed, on its own lines, which may "accrue by reason of business coming to it from or over "said Northern Division of the Cumberland & Ohio Rail- "road Company's lines for the purpose of discharging said "interest and sinking fund as they severally fall due." (Rec., 25.)

Joshua F. Speed, the trustee under these two mortgages, afterward resigned, and A. L. Schmidt, present defendant in error, was appointed in his place.

The lease heretofore mentioned from the Cumberland & Ohio to the Louisville, Cincinnati & Lexington Railway Company expressly provided that it was "not assignable without the consent of the grantor." (Rec., 6.) Nevertheless the lessee did assign it, and at the same time conveyed all the rest of the property of the lessee, the Louisville, Cincinnati & Lexington Railway Company, to the Louisville & Nashville Railroad Company, on November 1, 1881.

The lessor refused to consent to the assignment, but the assignee nevertheless entered upon and continued to operate the road. (Rec., 295.)

Schmidt, the trustee under the mortgages, knew, at the time it was made, of the general conveyance of all its property by the Louisville, Cincinnati & Lexington Railway Company, to the Louisville & Nashville Railroad Company, including the assignment of the lease held by the former on the Cumberland & Ohio. (Rec., 295.) But he doubtless also knew, as subsequent events seem to indicate, that the lessor had refused to consent to this assignment.

On October 12, 1885, Schmidt, as trustee for the bondholders, uniting with him certain individual bondholders, instituted this present action in equity against the Louisville, Cincinnati & Lexington Railway Company. (In Kentucky all civil judicial proceedings are "actions," and all final orders are "judgments," whether in equity or at law. We have no "suits" and no "decrees.") He pleaded the lease and mortgages heretofore mentioned (making no mention of the assignment of the lease); and then alleged that the last four gales of interest on the bonds had not been paid; and that the Louisville, Cincinnati & Lexington Railway Com-

pany had refused to pay them, although it had made large net earnings on its own lines out of business derived from the leased line. He said he did not know the amount of these earnings; and he prayed that the case be referred to the Commissioner to ascertain the amount thereof, and that the defendant, the Louisville, Cincinnati & Lexington Railway Company, be ordered to pay same into Court for payment of said interest.

The *Louisville & Nashville Railroad Company*, which, as before explained, and as plaintiff knew, was the assignee of the lease, and in fact the purchaser and in possession of all the property of the Louisville, Cincinnati & Lexington Railway Company, *was not made a party to this suit at all;* and of course, therefore, there was no allegation of any demand made *upon it* for earnings, or anything else. Plaintiff probably proceeded upon the theory that, as the Louisville, Cincinnati & Lexington Railway Company was a party to the agreements mentioned, it was bound by the covenants thereof, and that, as the lessor had refused its consent to the assignment to the Louisville & Nashville Railroad Company, it was at least doubtful if the latter was bound. But, whatever may have been plaintiff's reasoning on the subject, the fact remains that the Louisville & Nashville Railroad Company was not made a party to the action.

There was no attempt made to impound any earnings. No application for a receiver, and no attachment taken out. Neither was any lien claimed on the corpus of the property of the defendant. It was nothing more than a personal suit for an accounting between the two parties to a contract, in which the judgment finally entered, as will be presently noted, was "essentially a personal judgment, upon which the Court might have ordered execution to issue."

At the proper time the Louisville, Cincinnati & Lexington Railway Company filed its answer, which was very brief,

in which it denied that it had made any such net earnings as were alleged in the petition. (Rec., 33; Abstract, 12.)

Then began a long fight over the issue thus raised—several commissioners' reports, endless "statements," a wilderness of figures. During the course of the litigation the depositions of several officers of the Louisville & Nashville Railroad Company were taken, their official positions and the situation of the properties being plainly shown—no attempt whatever at concealment of anything. (Rec., 174–190.)

Finally on June 1, 1894, plaintiff succeeded in getting a judgment in the following form, viz.:

> "It is ordered that the motion for rule, as prayed on "May 28, 1894, be overruled, to which order plaintiffs "except; and it appearing to the Court that on the "$60,192.27 of earnings ascertained by report R. E. S. "No. 2, the defendant, Louisville, Cincinnati & Lexington "Railway Company, is entitled to a credit of $6,626.65, it "is allowed, and it is ordered that the balance of $53,- "565.62, as shown by said report, together with the inter- "est on the said earnings as they should have been applied "under the contract in payment of the interest on the "bonds, be paid into Court on or before the 11th day of "June, 1894, and a rule is awarded against defendants, "returnable on the 11th inst., to pay said sums of money "and interest into Court." (Rec., 214; Abstract, 15.)

Here was the final judgment in the action, simply an order to pay a specified sum of money into Court, a form of judgment which the Court of Appeals has since said in this action was "*essentially a personal judgment upon which the Court might have ordered execution to issue.*" (Abstract, 68; 47 S. W. Rep., 583.)

Plaintiff, however, did not choose to have an execution issued on this judgment. He preferred to proceed, as he had

a right to do, by process of contempt, and took a rule against the Louisville, Cincinnati & Lexington Railway Company to pay the money into Court.

Had execution issued it would have been returned "*nulla bona.*" And this was the response to the rule. (Rec., 215; Abstract, 16.)

Having failed to make his judgment out of the defendant in the action, plaintiffs, on May 27, 1895, offered to file "an amended and supplemental petition making the *Louisville & Nashville Railroad Company* a party to this suit." (Rec., 222.) *This was ten years after the original institution of the action and one year after final judgment had been entered therein.*

This "supplemental" petition here offered was an elaborate pleading alleging practically the same facts which had been alleged in the original petition against the Louisville, Cincinnati & Lexington Railway Company; but further alleging that *in 1881*, which was *four years prior to the institution of this suit*, the Louisville & Nashville Railroad Company had purchased the railroad of the Louisville, Cincinnati & Lexington Railway Company, and had received its earnings, and had conducted the defense of this suit against the Louisville, Cincinnati & Lexington Railway Company. And accordingly plaintiffs prayed that the Louisville & Nashville Railroad Company be made a defendant, and for judgment against it for the subjection of the earnings made on the railroad of the Louisville, Cincinnati & Lexington Railway Company. (Rec., 224–234). This supplemental petition is not copied into the Abstract of Record, because it was never allowed to be filed, and its statements were subsequently repeated in an affidavit, which was afterward filed, and which is copied into the Abstract, page 23.

The Court refused to allow this "supplemental" petition to be filed, or the Louisville & Nashville Railroad Company

to be made a party defendant; proceeding upon the principle well settled in Kentucky, and everywhere else, that when a final judgment has been entered in a cause and the time has passed in which the Court has control over its judgments, *the cause is at an end*, and it is too late then to open it up and bring in new parties, and grant relief against them. (Meadows vs. Goff, 90 Ky., 541; Brown vs. Vancleave, 86 Ky., 381.)

Plaintiffs then appealed to the Court of Appeals from the order refusing to allow this supplemental petition to be filed.

The Court of Appeals *affirmed* this judgment, or order, on April 4, 1896; and held that it was too late to bring a new party into the cause; but said in its opinion that if the facts stated in the amended petition were true the Louisville & Nashville Railroad Company was "*already a party* defendant and bound by the judgment"; and that the proper thing to do would be either to institute a separate suit against the Louisville & Nashville Railroad Company, setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Company in this suit by a rule based upon an affidavit stating the facts set out in the amendment. (Abstract, 56–63; 99 Ky., 143–155.)

The Court's attention was immediately called to the fact that the only matter before it was as to the propriety of the order of the lower Court in refusing to allow the amendment to be filed, and that the question of what subsequent proceedings plaintiffs should take was not before the Court. Thereupon the Court, in a modified opinion, conceded that "the opinion *went too far* in stating that questions were decided which were not strictly before the Court upon the appeal," and that what was said, as noted above, should be treated as having been said only *arguendo*. (Abstract, 64; 99 Ky., 156.)

Upon the return of the cause to the lower Court plaintiffs

adopted the suggestion of the Court of Appeals; filed an *affidavit* practically repeating the statements of the amended petition (Rec., 262; Abstract, 23), and moved for a rule against the Louisville & Nashville Railroad Company to pay into Court the sum of $53,565.62, the amount fixed in the judgment against the Louisville, Cincinnati & Lexington Railway Company. (Rec., 259; Abstract, 22.)

The lower Court, however, treating the language of the opinion of the Court of Appeals, heretofore mentioned, as a suggestion and not an adjudication, declined to issue the rule; and in this connection delivered a written opinion giving its reasons for so doing, which, we submit, for lucid exposition of fundamental legal principles and learned review of authority, would do honor to any court. (Rec., 272; Abstract, 33.) It showed that the suit was solely against the Louisville, Cincinnati & Lexington Railway Company, the original party to the contract with plaintiffs; that the Louisville & Nashville Railroad Company was not made a party defendant; that no process had ever issued against it; nor had it ever entered its appearance; and that no judgment had ever been entered against it; and neither was it a *pendente lite* purchaser, for whatever it purchased of the Louisville, Cincinnati & Lexington Railway Company was years before this suit was brought, as shown by duly recorded conveyance; that if the Louisville & Nashville Railroad Company were in fact liable it might seem a hardship to have to institute an original suit against it; but that it was plaintiffs' own fault that he had never brought that party before the Court; that *the Court could not know what defenses it had;* but it was entitled to "its day in court." (Rec., 272; Abstract, 33.)

Accordingly, as said above, the Court declined to issue any rule against the Louisville & Nashville Railroad Company, or to treat it in any manner as a party to that cause.

On appeal to the Court of Appeals it adhered to the views it had expressed in its opinion heretofore mentioned, and held that the lower Court ought to have issued the rule as requested. (Abstract, 65; 44 S. W. Rep., 130.)

On return of the cause to the lower Court plaintiffs renewed their motion for a rule, and thereupon the Court issued a rule against the Louisville & Nashville Railroad Company to "show cause why it shall not be required to pay into Court the sum of $53,565.62, as shown by the report herein of R. E. Sewell, No. 2, together with interest . . . which principal and interest now amounts to the sum of $90,181.87." (Rec., 292; Abstract, 49.) Or, as subsequently expressed by the Court of Appeals, the Court "awarded a rule against the appellant company to show cause why it should not be compelled to pay into Court *the amount of the judgment rendered against the Louisville, Cincinnati & Lexington Railway Company.*" (Abstract 68; 47 S. W. Rep., 583.)

This was the first time in all the history of this litigation that any pretense of process had ever issued against the Louisville & Nashville Railroad Company; the first time it had ever been called upon to make answer or response to any one; and then the call was to *show cause why it should not pay a judgment for money which had been theretofore entered against some one else.*

Being thus called on for the first time in the litigation it filed a response, in which, among other things, it said:

First. "*That it is not a party to this suit. It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent, or that is applicable to this "respondent, and no judgment or order has ever been "entered in this case against this respondent, and no pro- "cess has ever issued against or ever been served on this "respondent.*"

Second. "*There has never been a time from the insti-*
"*tution of this suit up to this time when this respondent*
"*could, with propriety, have filed an answer setting up its*
"*defenses against the alleged claim of the plaintiff, and to*
"*require it now to pay into Court upon this rule the amount*
"*stated in the rule, or any other amount, WOULD BE TO*
"*DEPRIVE THIS RESPONDENT OF ITS PROP-*
"*ERTY WITHOUT DUE PROCESS OF LAW,*
"*CONTRARY TO THE CONSTITUTION OF THE*
"*UNITED STATES IN SUCH CASES MADE*
"*AND PROVIDED.*

"If the plaintiff should be required, in the usual and
"orderly way, to institute a suit against this respondent
"to hold it liable for plaintiffs' alleged claim, this
"respondent has and could and would present good, valid
"and subsisting defenses thereto."

Third. The third paragraph of the response simply showed that if the judgment be considered a judgment against the Louisville & Nashville Railroad Company in favor of the bondholders, it should not be required to pay the full amount into Court because it held some of the bonds itself.

Fourth. The fourth paragraph showed that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser; and outlined what had been the manifest understanding and conduct of the case up to the time the Court of Appeals threw out the suggestion heretofore mentioned. The purpose of this outline was to show that it had never been the intention to sue the Louisville & Nashville Railroad Company, but only the Louisville, Cincinnati & Lexington Railway Company. It showed that the suit was instituted against the Louisville, Cincinnati & Lexington Railway Company alone, because it was the party

with whom plaintiffs had made their contract; though *plaintiffs knew, when they filed their suit, that the Louisville & Nashville Railroad Company was then the owner of the property which had been the railroad of the Louisville, Cincinnati & Lexington Railway Company;* though so far as concerned the assignment of the lease on the Northern Division of the Cumberland & Ohio, the latter had refused to consent to the assignment; and that plaintiffs instituted their suit against the Louisville, Cincinnati & Lexington Railway Company *on the contract*, believing that it could not avoid its liability by assigning the lease; it being the policy of plaintiffs first to get a judgment against the Louisville, Cincinnati & Lexington Railway Company, with whom they had the contract, and then, if they should fail to procure satisfaction of the judgment, sue the Louisville & Nashville Railroad Company and seek to hold it responsible. The response also showed that the *Louisville, Cincinnati & Lexington Railway Company was a distinct corporation and had continuously preserved its organization.* (Rec., 293; Abstract, 50.)

Upon the filing of this reponse plaintiffs moved to make the rule absolute, and the Court did so, entering a judgment in which, after making certain recitals as to the submission and filing of the opinion, etc., it proceeded as follows:

"And it is ordered and adjudged that the said response "to the said rule is *insufficient*, and the said rule is made "absolute, and the said Louisville & Nashville Railroad "Company is ordered to pay into Court *the amount of judg-* "*ment herein*, the said sum of $90,053.34, as of March 21, "1898, subject, however, to the following credit, viz.: . . .

"After allowing the credit aforesaid, the *balance due* "*upon said judgment* is the sum of $77,784.45, and the said "Louisville & Nashville Railroad Company is adjudged

"and ordered to pay the said sum into Court on the 7th "day of April, 1898.

"To the ruling of the Court in holding the response "insufficient, the Louisville & Nashville Railroad Com- "pany excepts." (Rec., 308.)

In entering this judgment the Circuit Court filed an opinion in which it again vigorously protested that this was *not due process of law*, but said it felt bound to adopt the views of the Court of Appeals, as expressed when it said the rule should issue. (Abstract, 52; Rec., 309.)

The Louisville & Nashville Railroad Company then appealed to the Court of Appeals from this judgment, where it was affirmed.

In view of the argument for defendant in error that this entire cause was simply a proceeding *in rem*, it is very instructive to note the view taken by the Court of Appeals at the conclusion of the cause as to the nature of the judgment entered. The Court itself, in a former opinion, had spoken of the proceeding as one *in rem*, and when its attention was called to this by appellant in resisting the application for damages on the supersedeas bond, such damages, by the Kentucky practice, being allowed only on *personal judgments* for money, the Court said:

"While this is true, yet the proceeding to compel the "payment of the fund into Court by the appellant company "is *essentially personal* against it, and a judgment, to be "enforced by rule, directing appellant to pay the amount "of the judgment into Court is, in our opinion, *essentially* "*a personal judgment, upon which the Court might have* "*ordered execution to issue.*" (Abstract, 69; 47 S. W. Rep., 583.)

It will be remembered that the only kind of judgment ever entered in the cause *against any one* was a judgment

ordering money to be paid into Court, and directing a rule to issue to compel its payment. And this was the character of judgment which the original petition prayed for. What therefore, the Court meant by saying that the *proceeding*, seeking such a judgment, was *essentially in rem*, but that the judgment, when thus obtained, was *essentially in personam*, we confess our inability to explain. But the important fact to be remembered is that the Court of Appeals has held in this case, in its *last opinion* therein, that such a judgment as was entered in this cause is "essentially a *personal* judgment, upon which the Court might have *ordered execution to issue.*" After the judgment of affirmance was entered, the writ of error from this Court was allowed.

ASSIGNMENT OF ERRORS.

The formal assignment of errors will be found in the record at page 322, and in the abstract of record at page 55. The effect of the assignment, however, is simply this, that

> In issuing and making absolute, a rule against the Louisville & Nashville Railroad Company to pay a personal judgment for money theretofore entered against another person, in which judgment the Louisville & Nashville Railroad Company was not even mentioned, and in a cause to which it was not even a party, that corporation is deprived of its property without due process of law, or at least will be so deprived if the judgment is enforced; and that this is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

In briefing a motion made at a former term to affirm the judgment herein as in a delay case, counsel said "the question which plaintiff in error attempts to raise has long been so conclusively settled against its contention that it is no longer open for argument"; and thereupon they proceeded to cite and comment on the authorities relied on by them and by the Court of Appeals of Kentucky to justify the course taken by them in this action.

Before stating our own views and authorities upon this matter, we think it well to examine the authorities which are said to have "conclusively settled" the question presented; for of course if the proceeding complained of is according to established precedents in the law, it is idle to contend that it is not "due process of law." We have read with care every case cited by the Court of Appeals, or by counsel for defendant in error in their elaborate briefs heretofore filed; in addition to which we have conducted an independent research; and we believe it can be truly said that the case at bar, so far as relates to the proceedings against the Louisville & Nashville Railroad Company, is absolutely *unique in jurisprudence.*

Not one single authority, whether text-book or judicial decision, has been found to show that, in all the history of English or American *jurisprudence*, a simple judgment for money *against one person* has ever been enforced as if it were a judgment for money *against an entirely different person*, who was *not named in the judgment, nor even shown by the record to be a party to the cause.* YET THAT IS WHAT WAS DONE IN THIS CASE.

Many cases can be found where a judgment has been held to be binding *as conclusive evidence on certain points* against one who was not a party to the record of the cause wherein it was entered; and again, judgments involving the disposition of specific property have been enforced by rule against *pendente lite* purchasers. But those cases are far different from this one.

Thus Lovejoy vs. Murray, 3 Wall., 1, is strongly relied on by counsel for defendant in error, and is as strong and as pertinent as any case they cite. And no case could better illustrate what is the really true principle involved in these cases, and the false application of it in the case at bar. There property had been taken by a sheriff under an attachment. A stranger claimed it. Plaintiff gave the sheriff an indemnifying bond; whereupon the sheriff sold the property. The stranger sued the sheriff in trespass; the sheriff gave his indemnitor notice; the latter employed counsel and took charge of the defense. Plaintiff recovered a judgment for damages against the sheriff; of which, however, he only received partial satisfaction. He desired then to proceed against this indemnitor. *But how did he proceed?* He could not in that case have proceeded by execution or rule, because the indemnitor was a non-resident. He had to go to his State to reach his property. But how did he proceed there? He did not treat the indemnitor as a party defendant to the judgment, and simply sue *on the judgment;* but he sued him *in trespass*, exactly as he had done the sheriff. This Court held that in this action of trespass the plaintiff had three points to establish, viz., (1) his title to the goods taken, (2) their value, and (3) the participation of the defendant in the conversion or trespass. And the Court further held that the first and second points were proved by the record of the action against the sheriff, and the last point was proved by the production of the indemnifying bond. This was very far from treating

the judgment as a money judgment against the indemnitor. It left the latter *free to set up any defense he might have* against this claim of personal liability, and simply made the judgment conclusive on the two points mentioned.

Elliott vs. Hayden, 104 Mass., 1.0, from which counsel also quote, is very much like the case just cited, except it is a State Court case, and all the proceedings occurred in the same State. Plaintiff, a claimant of property, recovered judgment against an attaching officer in an action for *conversion.* An indemnifying bond had been given the officer. Plaintiff desired to pursue the indemnitor. If such a doctrine as is now advocated had then ever been heard of in Massachusetts, plaintiff would have filed an affidavit and asked for an order directing either an execution or a rule to pay against the indemnitor. But he did neither. He sued him *in conversion*, as he had done the officer (thus giving him an opportunity to set up any defense he might have), and simply offered his judgment in *evidence on certain points.*

Cases like these have long been familiar to the profession. Is it not then most remarkable that never before the present case was such process as was pursued here ever adopted in any court of justice?

Strong reliance is also placed on Eagle Mfg. Co. vs. Bradley Mfg. Co., 50 Fed. Rep., 193; from which an extensive quotation is made in the brief. Plaintiff first sued David Bradley & Co., who were selling certain patented articles, for an infringement of its patent. It asked an injunction and an accounting, and got both; the main question being the *validity of plaintiff's patent.* (35 Fed. Rep., 295.) It then sued the Bradley Mfg. Co., a manufacturing concern of which the defendants in the former suit constituted a branch, and sought to enjoin it from manufacturing these articles. It showed that in the first suit the defendant in the second suit

had practically conducted the defense, and that the main point decided was the validity of plaintiff's patent. The Court, therefore, simply held in the second suit that this *question of validity* could not be relitigated. In the first case there seems to have been a decree for an accounting, but there was no attempt to collect this out of the defendant in the second case.

Bennett vs. Star Mining Co., 119 Ill., 9, involved simply the question of the validity of a mechanic's lien on real estate. There was no question of personal liability in the case. After the mechanic had brought suit to enforce his lien, and after process had been served on one of the parties in interest, but not on another, a third party bought the property. He came into the litigation, employed counsel and contested the validity of the lien under the names of the parties to the record. In subsequent litigation involving simply the question of the validity of this mechanic's lien, the Court held that this party was bound by the former adjudication *on that question.*

Daskam vs. Ullman, 74 Wis., 474, was a case where an assignee of a note sued the maker. The maker answered that the note had been paid to the assignor before the assignment. The assignor was notified of this defense, and assisted the plaintiff in endeavoring to disprove the plea of payment. Judgment, however, went for the defendant on this issue, and when the assignee subsequently sued the assignor to recover the amount of the note, the Court held that the former adjudication *on the question of payment* was conclusive.

In Palmer vs. Hays, 112 Ind., 289, a party sued under a statute of Indiana to have satisfaction entered of a judgment that had formerly been entered against him, which he claimed had been satisfied. It was shown on the trial that this judgment had once been replevied, and that the replevin

bail had brought a suit exactly similar to the present one to have satisfaction entered of that judgment, and that the plaintiff in the present case had really taken charge of that litigation on behalf of the bail, but had been defeated therein on the question of satisfaction. Accordingly the Court held in the second case that the former adjudication was conclusive *on this question.*

Coats vs. Roberts, 4 Rawle, 112, was a case where a party had been garnisheed to pay money. He denied that he owed the money to the debtor in the action, but insisted that the debtor had previously assigned the claim on him to a third party, of which he had been notified. And this third party took part in that trial and endeavored to show that he and not the debtor in the action, was the owner of the claim. The Court, however, decided against this contention, and compelled the garnishee to pay the money to the plaintiff in that attachment proceeding. Subsequently this third party, who had claimed to be the assignee of this debt, sued this garnishee to recover the debt, but the Court held that the judgment against the garnishee, under the circumstances heretofore explained, was conclusive evidence in his favor on the question of ownership of the claim, and that he could not be compelled to pay the money twice.

In Van Knoughnet vs. Denny, 68 Hun., 179, a party sued for money loaned and services rendered. His wife took an active part in the prosecution of the suit, and actually furnished the itemized account called for by the defendant, and testified in the case, etc., etc. The plaintiff established his claim as sued for, but defendant established a counter-claim for a larger amount, which was allowed, and judgment was given over for the balance. Subsequently the wife sued this same defendant for certain items of the account included in the previous suit, claiming that they were really due to

her and not to the husband. Of course the Court held that it would be a fraud to permit her to maintain such a claim, after having assisted her husband in establishing the claim on those same items against this defendant, and after he had actually received satisfaction thereof by the allowance of a credit on the defendant's counter-claim.

Stoddard vs. Thompson, 31 Ia., 80, was a case where Thompson sued on a note. Defendant pleaded that Thompson was not the owner of the note, but that one Stoddard was the owner. Stoddard had notice of the suit, and took part in the defense, and tried to establish his ownership. Judgment, however, went in favor of Thompson. Stoddard then sued to enjoin Thompson from collecting this judgment on the ground that Stoddard and not Thompson was the real owner of the note. The Court simply held that the record in the former case was conclusive evidence in the second case on the question of the *title to the note.*

Louisville & Nashville Railroad Company vs. Hall, 12 Bush, 131, and Heckman vs. Louisville & Nashville Railroad Company, 85 Ky., 638, cited by the Court of Appeals in its opinion, were simply cases of *misnomer*, where the defendant intended to be sued was simply sued by the wrong name, and where every allegation made in the petition could have been truly made against the real defendant under its proper name. But, of course, the case at bar is a wholly different case from that. Plaintiffs alleged in their petition that the Louisville, Cincinnati & Lexington Railway Company made the several contracts sued on, *which was true;* and they manifestly intended to sue this company, which was the *maker of these contracts.* They did not mean to sue the *subsequent purchaser* of the property to which the contracts related. Nor did they connect the purchaser in any way with the transactions, nor make a single averment against it, but

all of the averments were exclusively and appropriately against the contracting defendant. Hence, there was manifestly no case of misnomer.

Estell vs. Peacock, 44 Mich., 471 (also cited by the Court of Appeals), was where a party sued on a note given for logs. Defendant pleaded failure of consideration because the title to the logs was not in the plaintiff, but in a third party; and the third party undertook to establish this defense and to prove title in himself. The Court simply held that if this should be done, and judgment should be given on this issue, it would be conclusive on the question of the *title to the logs* in any subsequent litigation between the plaintiff in that suit and this outside party.

Marsh vs. Smith, 73 Ia., 295, Linton vs. Harris, 78 Ga., 265, Lyon vs. Stanford, 42 N. J. Eq., 411 (15 Stewart), Landis vs. Hamilton, 77 Mo., 555, and Valentine vs. Mahoney, 37 Cal., 398, each involved simply a question of *title to land.* In each of them where the question of title to a particular piece of land was presented for decision, the Court simply held that some adjudication in a former suit wherein that identical question was decided, and in which the parties to the second suit had been heard on that question, was conclusive on that one point of the *title to the land.*

We have thus at some length examined every case referred to by either Court or counsel in the action at bar to show that the question involved in the present case is "conclusively settled," except a few cases cited merely by their titles, with the statement that they are "cumulative on the same point"; and we now repeat the statement that no case has been found, or can be found, where a *judgment for money against one person* has been treated as a *judgment for money against an intirely different person.* But, on the contrary, while in some of the very cases cited by counsel for defendant (such as Lovejoy vs. Murray, 3 Wall., and Elliott vs.

Hayden, 104 Mass.) such process as that now contended for might have been, and doubtless would have been, used and applied, if it were known to the law, yet this was not done, but an independent suit was brought, in which full *opportunity* was allowed for *any character of defense that might be offered*, whether by way of traverse or confession and avoidance, whether by plea of limitation or accord and satisfaction, or estoppel of any kind, or any character of defense known to the law, and in which cases the former adjudication between different parties was simply used as *conclusive evidence on certain points therein adjudicated.*

II.

We think the foregoing review of the authorities relied on by defendant in error shows that they furnish absolutely no support for *the proceeding adopted in the case at bar*, which was wholly different from any attempted in any of those cases.

On the other hand, however, we do find that the theory of defendant in error was once, and only once before, so far as we can find, advanced and sought to be enforced ; but was promptly rejected as having no foundation in the law of the land.

We refer to the case of Bidwell vs. Toledo Consolidated Street Railway Company, 72 Fed. Rep., 10. In this case suit had been brought by plaintiff against the Toledo Consolidated Street Railway Company for an alleged infringement of a patent. After the cause had progressed to a considerable extent, including the making up of the issues and the taking of proof, the complainant made an application for leave to amend its bill and make the General Electric Company, which was a non-resident, a party defendant to the cause.

The grounds upon which this application was based and the reason for refusing it are so clearly stated in the opinion of Judge Ricks, and seem to be so directly applicable in principle to the case at bar, that we shall quote quite freely from the opinion. The Court said:

"The complainants have made application to this Court "for leave to amend their bill by making the General "Electric Company, a non-resident corporation, a party "defendant to this suit. It is not claimed that said pro- "posed defendant is within the jurisdiction of the Court "and amenable to its process, or that it can be brought in "by original subpœna. It is sought to hold it *as a defend-* "*ant in this case* because it is alleged the counsel who are "preparing and conducting the defense for the Toledo "Consolidated Street Railway Company are the general "counsel for said proposed defendant. It is further con- "tended that because said counsel have so assumed the "defense of this case; have furnished witnesses in the em- "ploy of the General Electric Company to testify on "behalf of the defendant; that such witnesses, while so "testifying, have been under salary from the General Elec- "tric Company; and that the latter has in fact agreed to "protect the said The Toledo Consolidated Street Railway "Company in the use of the appliances which it is claimed "are an infringement of complainants' patent, and that it "will conduct any defense which the said Railway Com- "pany may be called upon to make in Court by reason of "the use of such appliances—*that by such conduct it has,* "*in legal effect, entered its appearance in the suit.*

"The Court passed upon an application of a somewhat "similar character made in this case some time ago. From "a statement of the facts as above stated, it will be observed "that the Court is now asked to declare that the General "Electric Company, by assuming the defense of this suit,

"as alleged, on behalf of the Toledo Consolidated Street "Railway Company has in fact entered its general appear- "ance, and *made itself a defendant in this case*, and is to "be bound by the decree, if one should be made in favor "of the complainants and against the defendant. It is not "claimed that there was any intention on the part of the "General Electric Company to become a party to this case, "or that there is any such desire on its part. It is sought "to make the decree in this case binding upon that cor- "poration because of the acts before stated.

"Is it possible for a Court to make any orders in this "case, under these facts, which would make said corpora- "tion a party defendant in this suit against its wish? "Counsel insist that the Court has authority to make such "an order, and it should be made to promote justice. It "is urgently contended that the plaintiff is now in fact "prosecuting this case against both the Toledo Consolidated "Street Railway Company and the General Electric Com- "pany: that the latter is giving to its vendee and the user "of its electrical appliances the benefit of its great corpo- "rate wealth and influence, and the benefit of the experience "and ability of its counsel; and that if as the result in "such a contest the complainants should prevail, they "should have the benefit of their victory by securing a "decree which would be binding and conclusive upon the "General Electric Company in any subsequent litigation "that may occur between the parties."

The Court then proceeds to refer to a case which had been cited as authority for such a proceeding, and which case had in terms cited Lovejoy vs. Murray, 3 Wall., 1, and Robbins vs. City of Chicago, 4 Wall., 657, and then said:

"These are the cases relied upon by Judge Shiras to "support his decree in the case cited by complainants'

"counsel. They could not have been cited as authority to "support the construction which counsel in this case now "seek to put upon the decision made by Judge Shiras in "the case to which reference has been made. As before "stated, Mast & Co. were not made parties to the suit before "Judge Shiras, and the decree did not undertake to *bind* "*them as a party defendant*, but simply undertook to show "such a state of facts as would tend to estop them in sub- "sequent litigation from again controverting *the issues* "*made in the suit of which they had notice* and in which "they were interested, and in which they participated in "the manner stated.

"It may be that on the final hearing of this case, the "evidence may disclose such conduct on the part of the "General Electric Company—such a participation in the "actual defense of this suit—as will justify the Court in "making a statement of such facts on the face of the "decree, to the end that, in subsequent litigation involving "the same issues or the same interests, the complainants "may have a right to contend that the General Electric "Company is estopped from further defending against the "same. That is as far as the Court went in the case cited "in 41 Federal, 351. . . .

"I am, therefore, of the opinion that as the General "Electric Company is a non-resident corporation, and can "not be brought into this Court by original subpœna, leave "can not be given to amend the bill to make it a party "against its will by reason of the facts hereinbefore "stated. . . .

"The question of whether it has so identified itself "with this case as that it may be hereafter estopped in "subsequent litigation from again defending as to the "issues or interest now involved is a question, as I have "before said, which can only be passed upon at the final "hearing and in the final decree. This is certainly as far

"as the Court under any circumstances would have author-
"ity to act. I can find no authority for the proposition
"that by such action as the General Electric Company has
"taken with reference to this case, as hereinbefore stated,
"it has made itself (being a non-resident corporation),
"against its own intention and wish, *a party defendant in*
"*this case*, and thereby conferred upon the Court authority
"to make a decree binding and conclusive upon it *as a*
"*party defendant.* It may have put itself in a position to
"estop it in subsequent litigation as heretofore stated. It
"will be proper to determine that question when it arises."

It is true that in the case just cited the General Electric Company was a non-resident, but that was not a material fact, if the principle contended for be true, because a non-resident may voluntarily enter its appearance and *make itself a party* to a cause (if such a thing were in any event possible), just as easily as can a resident. And this suggests a question put in his written opinion by the learned judge who decided the case at bar in the first instance in the State Court. He said:

"In the case at bar let us suppose that the Louisville
"& Nashville Railroad Company had its habitat in
"another State—say in the State of Tennessee, instead of
"Kentucky—would the judgment against the Louisville,
"Cincinnati & Lexington Railroad Company be binding
"upon it, and could a suit upon a certified copy of the
"record in which its name nowhere appears be maintained
"against it in any other State or Federal Court?"
(Abstract, 44; Rec., 284.)

We cannot believe this question can be answered in the affirmative. Possibly an original suit might be brought in Tennessee, in which the record in the case at bar could be

used as evidence against the Louisville & Nashville Railroad Company, on certain points therein adjudicated, as was done in Lovejoy vs. Murray, 3 Wall., 18, and in Elliott vs. Hayden, 104 Mass., 180, heretofore cited; but that an *an action on the judgment* could be maintained against the Louisville & Nashville Railroad Company as a *party defendant to that judgment*, we cannot believe possible.

III.

The result of the particular line of cases we have been considering is, we think, very clearly stated by Judge Ricks in the case last cited, viz.: that a person may, by taking part in litigation to which he is not a party, estop himself under certain circumstances from denying the matters *adjudged therein;* but he does not thereby make himself a *party to the cause*, or authorize the court to enter a judgment therein against him personally as *a party defendant. These two things are very widely different from each other in legal effect;* and it is this difference which the Court of Appeals and defendant in error have completely overlooked in reaching the conclusion that the procedure adopted in the case at bar is according to established precedent, and is therefore due process of law.

Thus if suit be brought against such a party, as we have supposed, and he makes defense on points which were involved and decided in the former litigation, that former adjudication may be conclusive upon him *on those points;* but *he may have other defenses*, based upon *matters personal to him*, which were not and could not have been litigated in the former suit, and he, at least, has a *right to be heard* as to whether he has or not. But if he is held as a party defendant to the former judgment, *all defenses are cut off.*

A very clear illustration of this may be supposed in the case of a surety upon a note. Suppose the payee, believing the maker abundantly solvent, and not caring to bother with the surety, sues *the maker alone.* The surety, however, hears of the suit, and may know that as a matter of fact the maker is insolvent, and that at some time an attempt will probably be made to collect the debt off of him (the surety.) He, therefore, takes naturally a very lively interest in the suit. The defendant (principal) may plead *non est factum*, or no consideration, or a vicious consideration. The surety knows that if any of these defenses shall prevail it will certainly release him. He, therefore, seeks to establish them, may possibly testify in support of them, and practically takes charge of the defense. But judgment goes for plaintiff against the principal. Execution is returned "no property found." He then sues the surety. The surety pleads (1) *non est factum* as to the principal; (2) *non est factum* as to himself; (3) vicious consideration; (4) some matter of estoppel between himself and the payee; (5) limitation. Now, upon the *first* and *third* points, possibly the former adjudication might bind the surety, but surely he would not be thereby precluded from making his *second*, *fourth* and *fifth* points. Yet, if that judgment is treated as a judgment against him personally, *all his defenses* are thereby cut off. The foregoing is merely a simple *illustration of the difference* between holding a judgment to be conclusive *evidence of certain facts* against a person, and holding it to be a judgment against him as *a defendant in the judgment.*

Neither can it ever be assumed that the person could not possibly have any other defense against his personal liability than such as was made in the action already tried. *He has a right to be heard on this question.* It can not be presumed that he has *no defense;* nor can it be *prescribed what his*

defenses may be; though it may be known that as to *certain defenses* he is *concluded.*

The case of Rees vs. Watertown, 19 Wall., 107, is very suggestive and instructive in this immediate connection. Rees was the holder of bonds issued by the City of Watertown. He brought suit against the City and obtained judgment and a return of "no property found." He then brought suit for mandamus to compel the levy of a tax to pay the judgment. He had three writs of mandamus issued; but each of them was evaded by resignation of the officials of the town. The matter was necessarily one of great publicity. Every one knew of it. Rees then brought suit in equity against the City, showing these facts, and insisting that the corporate authorities were trustees for creditors; that the property of the citizens was a trust fund to pay the debts of the City; and asking that the Court enter a decree subjecting *the individual property of the citizens;* that it direct the marshal to report the property to the Court "*where any objections should be heard;*" that the amount of the debt be apportioned among the several owners of property; and that the marshal be then directed to collect these several amounts, or in default of payment sell the property. The Court refused the relief sought, and said that to grant it would be *to take property without due process of law.* In the course of its opinion it said:

> "Due process of law undoubtedly means in the due "course of legal proceedings, according to those rules and "forms which have been established for the protection of "private rights. . . . *Whether in fact the individual has* "*a defense to the debt, or by way of exemption, or is with-*"*out defense, is not important. To assume that he has* "*none, and, therefore, that he is entitled to no day in court,* "*is to assume against him the very point he may wish to* "*contest.*" (Pages 122, 123.)

IV.

Now let us recall what was done in the case at bar. As we have already noted, there was no claim of a lien upon any tangible property, and no attempt by either an attachment or a receiver to get control of any specific fund. The prayer in the petition that defendant be required to pay into Court the earnings, upon which a lien was claimed, was simply a prayer for *final decree to that effect*, not an attempt to have the receipts from the property paid into Court from month to month during the litigation, and no attempt was ever made to have such a thing done. Pending the litigation the possession of the property was left undisturbed, with the right in the possessor to collect and use the earnings thereof. Furthermore the Louisville & Nashville Railroad Company was then the owner and in possession of the property, as plaintiff knew, and yet it was not even made a party, nor any allegation made as to any kind of demand having been made upon it. It was not mentioned in the petition, but even if it had been, no relief was prayed against it, and therefore if the judgment of 1894 had expressly ordered the Louisville & Nashville Railroad Company to pay this money, it would, by the settled law of Kentucky, have been void. (Allsmiller vs. Freuchtenicht, 86 Ky., 205.) Plaintiffs simply trusted to the *personal ability of the defendant* to respond at the end of the litigation to any judgment that might be entered ordering it to *pay money*.

And when the judgment was entered it was simply an order that the Louisville, Cincinnati & Lexington Railway Company pay money into Court. It recited that the Commissioner's report showed $60,192.27 of earnings, but that defendant was entitled to a credit of $6,626.05, and therefore ordered that "the balance of $53,562.62" be paid into Court.

It is true of course that this was the amount of "earnings" which the Court held that defendant, the Louisville, Cincinnati & Lexington Railway Company, had received; and its liability to pay this amount into Court grew out of this fact; yet the thing ordered to be paid into Court was simply *money*, the amount of a balance of an account beginning back in 1882, twelve years before this order was made and three years before even the suit was begun; and in fact the account made by this report *closed in 1890*, four years before this order was made. The money which had from time to time during all these years from 1882 to 1890 been received from the operation of the road, or from carrying any specific freight or passengers, had no earmarks; and if any part of it was on hand in 1890, when the account in the report closed, even that was, of course, not on hand in 1894, when the order to pay was entered.

In other words, it was simply a *judgment for money*, operating purely *in personam;* and its enforcement was attempted in what was originally the sole means of enforcing such decrees in equity, viz., by rule or other process of contempt.

In Daniell's Chancery Pleading and Practice (5th ed., Vol. 2, Ch. 26, Sec. VI, side page 1032), the author says:

> "'Formerly a decree in a court of equity, unless it was "'for land, operated only *in personam;* and the only "'method of enforcing it was by what is termed process of "'contempt, against the party disobeying it.'"

And again (Sec. VII, side page 1042):

> "'All decrees and orders may, as we have seen, be "'enforced by process of contempt. Such as direct pay- "'ment of a sum of money or costs may *also* be enforced

"'under the act considered in the last section, by writs of "'*fieri facias* and *elegit*.'"

In Kentucky it is provided by statute that:

"A final order or judgment for money, lands or other "specific things, may be enforced by any appropriate "writ of execution *allowable on a judgment at law*, "according to the nature of the case.

"Such writs shall issue and be returnable as other "writs of execution.

"*Nothing in this article shall prevent any party from "proceeding to carry an order or judgment of Court into "execution according to the ancient practice of Courts of "Chancery.*" (Ky. Statutes, Sec. 1663.)

Accordingly, after the judgment was entered for the payment of this money, the Court proceeded, as it had the right to do, to endeavor to enforce it by a rule to pay. And it might, if it had seen fit, have ordered an execution of *fieri facias* (which only issues on judgments *in personam*) to issue upon it. If it could possibly need any authority to establish such a proposition, the last opinion delivered by the Court of Appeals in the case at bar furnishes it; for the Court there says: "A judgment to be enforced by rule, directing appellant to pay the amount of the judgment into Court, is, in our opinion, *essentially a personal judgment, upon which the Court might have ordered execution to issue.*" It is true the Court is here speaking of the order directing the Louisville & Nashville Railroad Company to pay the money into Court; but surely, if an order directing the Louisville & Nashville Railroad Company to pay the money into Court was "essentially a personal judgment,"

then the order directing the Louisville, Cincinnati & Lexington Railway Company to pay the same into Court was likewise "essentially a personal judgment."

The case then comes to this, as we have said before, a judgment which is "essentially a personal judgment" against the Louisville, Cincinnati & Lexington Railway Company, the sole defendant in the cause, is enforced by rule—the ancient chancery mode of enforcing personal judgments—as a personal judgment against a totally different person, who is not even a party to the record. It is not used merely as conclusive evidence against him on the points therein adjudicated, but is to be enforced by rule to pay, as if it were itself a personal judgment against him, *thus cutting off all defenses.*

V.

Just at this point it is well to see what rule the Court of Appeals lays down by which it is to be determined whether or not the Louisville & Nashville Railroad Company is a party defendant to this judgment, inasmuch as it is not named in it nor shown by the record to be a party to it.

We find that the Court settles this question in its opinion by very specific language. In reversing the judgment of the lower Court, which had refused to issue the rule against the Louisville & Nashville Railroad Company, the Court of Appeals said:

> "If the Louisville & Nashville Railroad Company is a "party to this suit, it is so because it has, as assignee of "the contract and owner of the property of the Louisville, "Cincinnati & Lexington Railway Company, obtained the "net earnings and conducted the defense of this suit, and "the truth of these averments can be ascertained upon rule "and response." (Abstract, 66; 44 S. W. Rep., 130.)

Thus the Court in its opinion clearly and specifically laid down the scope of the inquiry to be had in determining whether or not the Louisville & Nashville Railroad Company was subject to the jurisdiction of the Court and a party to the action and the judgment therein. There were but three matters to be inquired into, viz.: (1) Is the Louisville & Nashville Railroad Company the assignee of the lease and the owner of the property of the Louisville, Cincinnati & Lexington Railway Company? (2) Did it obtain the net earnings of that property? and (3) Did it conduct the defense of this suit? These three, and *these three questions only*, were to be the subject of inquiry; and if they should be answered in the affirmative, then the Louisville & Nashville Railroad Company was to be considered "*a party to this suit*" and concluded in every respect by the judgment therein, as much so as if named in it, and *therefore precluded from making any defense which it might have*, and which possibly the Louisville, Cincinnati & Lexington Railway Company did not have or did not assert.

The Court recognizes that merely defending the suit could not make the Louisville & Nashville Railroad Company a defendant and give the Court *jurisdiction over it;* but it says that if, in addition to this, it "*obtained the net earnings*"—a fact having no connection at all with the Court proceedings, and one to be determined by extraneous investigation subsequent to the judgment—then it was *a party to the suit* and the Court had *jurisdiction over it.* But if, on investigation it shall turn out, that it *did not obtain the net earnings*, then it is *not a party* to the suit, and the Court *did not have jurisdiction over it.* To our minds this proposition is legally and logically incomprehensible. We can understand how the receipt or non-receipt of such net earnings has a most material bearing on the original question of the

liability or non-liability of the company to plaintiffs' demand; but what bearing such question of receipt or non-receipt of net earnings of a railroad can have on the question of whether or not the company is *a party to this suit* is to us absolutely incomprehensible.

But that no such extraneous inquiry, to be conducted after a cause had been tried and a judgment rendered, can determine the jurisdiction of a Court over a person, has been absolutely settled by this Court in Pennoyer vs. Neff (95 U. S., 714.) There a non-resident defendant had been proceeded against merely by *constructive service* of process, and a personal judgment for money had been given against him under express authority of a State statute. On this judgment execution issued and was levied on his land in the State. It was sold, and the purchaser put into possession. The party thus proceeded against then returned and sued the purchaser in ejectment to recover his land. The purchaser, of course, defended under the proceedings mentioned, and argued that they should be held valid, because, while the defendant was not personally before the Court, yet it was manifest from subsequent developments that he had *land* in the State, and that as the statute might have authorized, and in fact did authorize, such land to be seized under attachment *at the beginning* of the action, although on constructive service of process only, there was no substantial reason why a judgment personal in form might not be entered and execution issued, and, if land was found to be levied on, then be treated as held under a valid seizure—that this was a mere "question of procedure," and, as the statute authorized it, it should be upheld. This reasoning was quite plausible; and in fact it captured one member of the Court, Mr. Justice Hunt; but all the other members, speaking through Mr. Justice Field, said:

"But the answer to this position has already been "given in the statement that the jurisdiction of the Court "to inquire into and determine his obligations at all is "only incidental to its jurisdiction over the property. *Its "jurisdiction in that respect can not be made to depend upon "facts to be ascertained after it has tried the cause and ren- "dered the judgment.* If the judgment be previously "void, it will not become valid by the subsequent discov- "ery of property of the defendant, or by his subsequent "acquisition of it. The judgment, if void when rendered, "will always remain void; *it can not occupy the doubtful "position of being valid if property be found, and void if "there be none. . . . This doctrine would introduce a "new element of uncertainty in judicial proceedings.*" (Page 728.)

So in the case at bar we say that the question of whether or not the Court had jurisdiction in 1894 to render a judgment against the Louisville & Nashville Railroad Company —which, by the way, it did not even purport to do—can not be made to depend upon facts *inquired into four years afterward*, viz., as to whether it did or did not receive certain net earnings of a railroad. If the Court did not *intend* it to be, and did not make it, a judgment against the Louisville & Nashville Railroad Company, *when it was rendered*, it could not be made such four years afterward upon allegation or determination of facts not appearing when the judgment was rendered.

It must be remembered that the proceedings had upon the rule against the Louisville & Nashville Railroad Company in 1898 were not for the purpose of entering a judgment against it upon facts which might thus appear, but was simply for the purpose of ascertaining whether or not it was *already* a party to the action and *already* bound by the judg-

ment *theretofore entered* in 1894, and, if so, then of enforcing the judgment. For the Court held that if the company was not *already* in, it was too late then to bring it into the case, after final judgment therein had been entered. (Abstract 63; 99 Ky., 155.) But such an inquiry as was thus directed is precisely such as this Court in Pennoyer vs. Neff says can not be had, the Court saying: "This doctrine would introduce a new element of uncertainty in judicial proceedings."

We may concede for the purpose of argument, and as not necessary now to be determined, that the conduct of the Louisville & Nashville Railroad Company in connection with this suit prior to the rendition of the judgment of 1894 against the Louisville, Cincinnati & Lexington Railway Company, may have been such that, if it should be sued by plaintiffs, that judgment would be *conclusive evidence against it on certain points adjudicated therein*, as, for example, on the question so bitterly contested, as to whether the contract covered the earnings on business going both ways or only one way, and on the question of the amount of such earnings. But we do most confidently submit that the Louisville & Nashville Railroad Company *was not in 1894 a party to this cause;* that the Court did not have jurisdiction to render a judgment ordering it to pay money into Court; that the Court did not know it was doing so, that it did not purport to do so, and did not in fact do so; and that the judgment of 1894 is *therefore not a judgment against the Louisville & Nashville Railroad Company, and can not be enforced as such.* And with equal confidence we submit that the Court can not presume, conclusively or otherwise, that if the Louisville & Nashville Railroad Company should be sued by plaintiffs on their demand, it would or could have no defense, or no defense other than those points adjudicated in this suit against the Louisville, Cincinnati & Lexington Railway

Company. As to whether or not it has such defense or defenses, is, in the language of this Court in Rees vs. Watertown, "*not important. To assume that he has none, and therefore that he is entitled to no day in Court, is to assume against him the very point he may wish to contest.*" We may, however, briefly suggest that it may desire to be heard on the question of whether or not *any demand* was ever made *upon it* for these earnings, and, if not, then as to whether it is liable for them to the trustee, as no receiver was ever appointed to collect them. (Freedman Savings Company vs. Sheppard, 127 U. S., 494, 502, and cases there cited.) Or it may desire to be heard on some question of estoppel applicable to it. All these questions, however, are foreclosed, if the judgment of 1894 is to be held a judgment *against it*, simply because it received the earnings, and took part in the defense of this suit.

We, therefore, submit that by the action of the Court (if allowed to stand), in treating the judgment in this cause as a judgment against the Louisville & Nashville Railroad Company, and ordering it to pay the same, it will be deprived of its property without due process of law.

VI.

What is meant by this "due process of law" which is guaranteed by the Federal Constitution can not be defined with precision, nor measured with an iron rule. The subject is too broad and too vastly important for such an attempt. But this Court has often shed much light on the subject, and has said that some proceedings are, and that others are not, "due process of law." One thing we know is that the right thus guaranteed is something substantial; that it is not "too vague and indefinite to operate as a practical restraint."

(Hurtado vs. California, 110 U. S., 535.) And another thing we know is that due process of law is not just anything which a court, a legislature or an executive officer may choose to declare such. (C., B. & Q. R. Co. vs. Chicago, 166 U. S., 235.)

One principle which we believe will be found to run through all descriptions or definitions of "due process of law" is that it must at least be some "established" process, not something erratic, sporadic or unique, but something general, uniform and fixed. The very idea of *law* itself involves the conception of "a *rule*, not a transient, sudden order from a superior to a particular person, but something permanent, uniform and universal." Moreover it involves the idea of "a rule *prescribed*," that the people who are to be controlled by it may be notified of it. "But the manner in which this notification is to be made is a matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, as is the case of the common law of England. It may be . . . by writing, printing, or the like, which is the general course taken with all our acts of Parliament." (1 Blackstone, 44–46.) And it is this conception of law that enters into the definitions or descriptions of "due process of *law*" which this Court has given, as applied to judicial proceedings.

Thus in Rees vs. Watertown (19 Wall., 107–122), the Court said:

> "Due process of law, it is said, undoubtedly means in "the due course of legal proceedings, according to those "rules and forms which have been *established* for the pro- "tection of private rights."

In Bank of Columbia vs. Oakley, 4 Wheat., 235–244, the Court said:

"They" (the words, due process of law) "were intended "to secure the individual from the arbitrary exercise of "the powers of government, unrestrained by the *estab-* "*lished* principles of private right and distributive justice."

In Hurtado vs. California, 110 U. S. 535, the Court said:

"Law is something more than mere will exerted as an "act of power. It must be not a special rule for a par- "ticular person or a particular case, but . . . the general "law . . . so that every citizen shall hold his life, liberty, "property and immunities under the protection of the "general rules which govern society."

In the late case of Holden vs. Hardy, 169 U. S., 366–390, this Court, through Mr. Justice Brown, said:

"What shall constitute due process of law was perhaps "as well stated by Mr. Justice Curtis in Murray's Lessee "vs. Hoboken Land Co., 18 Howard, 272–276, as anywhere. "He said: 'The Constitution contains no description of "'those processes which it was intended to allow or for- "'bid. It does not even declare what principles are to be "'applied to ascertain whether it be due process. It is "'manifest that it was not left to the legislative power to "'enact any process which might be devised. The article "'is a restraint on the legislative as well as on the execu- "'tive and judicial powers of the government, and can "'not be so construed as to leave Congress free to make "'any process due process of law by its mere will. To "'what principles then are we to resort to ascertain whether "'this process, enacted by Congress, is due process? To

"'this the answer must be twofold; we must examine the "'Constitution itself to see whether this process be in con- "'flict with any of its provisions. If not found to be so, "'we must look to those settled usages and modes of "'proceeding existing in the common and statute law of "'England, before the immigration of our ancestors, and "'which are shown not to have been unsuited to their "'civil and political condition by having been acted on by "'them after the settlement of this country.'"

In Pennoyer vs. Neff, 95 U. S., 714–733, in speaking of due process of law, the Court said:

"Whatever difficulty may be experienced in giving to "those terms a definition which will embrace every possi- "ble exertion of power affecting private rights, and exclude "such as is forbidden, there can be no doubt of their "meaning when applied to judicial proceedings. *They* "*then mean a course of legal proceedings according to those* "*rules and principles which have been ESTABLISHED* "*in our system of jurisprudence for the protection and* "*enforcement of private rights.*"

So we repeat that all through this Court's definitions or descriptions of this "due process of law" runs this idea of "a course of judicial proceedings according to those rules and principles which have been *established* in our system of jurisprudence."

Now it is not claimed that any statute has established or authorized the remarkable procedure that was taken in this case against the Louisville & Nashville Railroad Company. Neither has it been established by custom or judicial precedent. It is purely *the Court's invention in this solitary case.* We say truly the *Court's* invention, for such it is. Counsel for defendant in error supposed of course they would have to

make the Louisville & Nashville Railroad Company *a party to the cause* before they could get a judgment against it; and they who had brought the suit and conducted it from beginning to end, *knew it was not such a party up to that time;* hence they offered to file an amended and supplemental petition *making it a party*, and praying for judgment against it. But the Court said in effect: that is not necessary; in fact it is too late to do so; just issue a rule against it to pay the judgment heretofore entered against the Louisville, Cincinnati & Lexington Railway Company and show that the Louisville & Nashville Railroad Company actually received the net earnings for which that judgment was entered, and actually defended that suit, and we will simply treat that old judgment against the Louisville, Cincinnati & Lexington Railway Company as a judgment against the Louisville & Nashville Railroad Company, and order it to pay the same, without hearing it as to any defense it may have against the claim of liability.

We submit that the fact that during all the ages in which courts have been administering justice, in equity and at law, such a thing was never done before, although equal opportunity has offered in countless cases, is conclusive that the great lawyers who have gone before us, who have made the law what it is, who are the authors of "those rules and principles which have been established in our system of jurisprudence," have never recognized in a proceeding such as this "due process of law," and that *it is not such.*

This is not the case of a new remedy necessitated and invented for an unprecedented or novel condition of affairs. Similar circumstances have existed before, as shown by the cases of Lovejoy vs. Murray, 3 Wall., 1; Elliott vs. Hayden, 104 Mass., 180, and others. But never before was such a procedure adopted as prevailed in the case at bar, and *never*

but once before was such a doctrine ever suggested, and then it was promptly rejected. (Bidwell vs. Toledo, etc., R'y Co., 72 Fed. Rep., 10.)

Moreover, not only has such a proceeding never been "*established*," but it is in direct contravention of a fundamental principle of legal proceedings which has been "established," and is strongly asserted by this Court in Pennoyer vs. Neff, 95 U. S., 714–733 (repeated and reaffirmed in Scott vs. McNeal, 154 U. S., 46), where the Court said:

> "To give such proceedings any validity there must be "a tribunal competent by its constitution—that is, by the "law of its creation—to pass upon the subject-matter of "the suit; and *if that involves merely a determination of "the personal liability of the defendant, he must be brought "within its jurisdiction by service of process within the "State, or his voluntary appearance.*"

By the term "voluntary appearance" here used by the Court, it manifestly meant appearance of record by a person who is named as a party to the record; for this is the universally recognized meaning of the term "appearance." The Court doubtless did not imagine that a case would ever arise where a court would attempt to treat a personal judgment against a particular person, named in the record, as a personal judgment against a different person who was not named in the record. Appearance certainly means at least appear ance of record, not merely appearance in the court house or association with defendant. In fact it has been the settled law of Kentucky for seventy years that even where the *record* shows a person "*appeared*" in an action, this does not make him a party, or give the Court jurisdiction to enter a judgment against him, when he is not named as a defendant in

either the petition or process. (Plummer vs. Crain, 5 T. B. Mon., 378.)

Now in the case at bar the judgment which has been held to be a judgment against plaintiff in error is, as we have seen, "essentially a personal judgment," and yet prior to the rendition thereof the plaintiff in error had never been brought within the jurisdiction of the Court by service of process, nor by entry of appearance. In fact no process had ever been issued against it. Not only so, but it was not even named in the petition, and there was no allegation against it, directly or indirectly, nor demand, nor prayer for relief, against it; so there was *nothing for it to appear to.*

The language of the learned Circuit Judge on this subject is very strong. He says:

> "It is frankly admitted that the plaintiffs had no con-
> "tract whatever with the Louisville & Nashville Railroad
> "Company, but that the contract sued on was with the
> "Louisville, Cincinnati & Lexington Railroad Company
> "and not with the Louisville & Nashville Railroad Com-
> "pany. And the record shows that the Louisville &
> "Nashville Railroad Company is nowhere mentioned in
> "the original or amended petition, nor in the captions or
> "any of them, nor in the statements, or charges, or inter-
> "rogatories, or prayer for relief, or prayer for process. It
> "is an equally apparent fact that the Louisville & Nash-
> "ville Railroad Company was never summoned or served
> "with process, or never appeared or entered its appearance,
> "or authorized its appearance to be entered in the suit, and
> "there is no averment anywhere in the plaintiffs' pleadings
> "in this suit of the legal existence of the Louisville &
> "Nashville Railroad Company." (Abstract, 45; Record, 284.)

But counsel for defendant in error argues in effect that the Louisville & Nashville Railroad Company knew plaintiff wanted to get this money *from somebody*, and it *ought* to have come into Court and filed an answer and told plaintiffs the exact facts, and made defense, assuming that plaintiffs would have sued it, if they had known the facts. But, in the first place, plaintiffs *did know the facts*, as the response shows; and, in the second place, the law imposes no such obligation on any one. In Pennoyer vs. Neff, 95 U. S., 728, the Court quotes with approval the language of Webster vs. Reid, 11 How., that:

> "*No person is required to answer in a suit on whom "process has not been served, or whose property has not "been attached.*"

No process was ever served on plaintiff in error prior to the entry of that judgment which has been held to be a judgment against it, nor was its property ever attached.

It is true that years after a final judgment had been entered against another, the Louisville & Nashville Railroad Company then had notice that it was claimed to be a *party defendant to that judgment*, and that it was proceeded against *as such*. And it had a hearing upon *that question*, and *that question only*. But that was not a hearing *upon its liability to plaintiffs;* for if it was a party defendant to that judgment then this question was foreclosed, and it would be given no opportunity to make defense of any kind against the demand of plaintiffs upon it.

But it is said it was given a hearing upon the question of whether or not the preceding judgment was a judgment against it, and the Court held it was, and that this must be the end of the matter. *This we utterly deny.* This would be in effect to hold that the judgment of the State Court, to

the effect that we have had due process of law, is final and conclusive; which, of course, can not be true, and is not true, as this Court has held.

In Scott vs. McNeal, 154 United States, 34, it appears that Scott had disappeared from home. After an absence of seven years, without his being heard from, some relative applied to the Probate Court, in the State of Washington, in the county where he had resided, to have an administrator appointed, on the ground that he was dead. The Probate Court heard the evidence, held that he was dead, and appointed an administrator. This administrator applied to the Court for authority to sell Scott's real estate, and after formal proceedings, as authorized by statute, the order was entered as sought. The administrator then sold to a certain purchaser, who in turn sold to McNeal. Deeds were passed and the purchase money paid. Scott afterward returned and brought an action of ejectment against McNeal to recover his land. McNeal defended behind the Probate proceedings. He contended that granting letters of administration is "*in the nature of a proceeding in rem;*" that "*public policy* and necessity" required that rights depending upon the death of persons long absent should be settled; that a man is responsible for the natural consequences of his acts; that these Probate proceedings were the natural consequences of Scott's acts, and that he was therefore *estopped* to complain of them and take this property back. How familiar all that sounds to one who has read the briefs of the present defendants in error!

On the other hand, Scott contended that the proceedings were not binding upon him, and "that to give effect to the Probate proceedings, under the circumstances, would be to deprive him of his property without due process of law." There was a trial. The trial Court held that the Probate

Court had jurisdiction to try the very question it did try; that its proceedings were not void; that title passed under them; and it instructed the jury to find for defendant McNeal in the ejectment suit. Scott appealed to the Supreme Court of Washington. It likewise held the proceedings of the Probate Court valid, saying, "*The proceeding is substantially in rem*"; and therefore affirmed the judgment in the ejectment suit. (5 Wash. St., 309.) Thus Scott had had a full and fair trial in the State Court on the question of whether or not he was bound by the judgment of the Probate Court; and the State Court had held that it was "substantially *in rem*" and he was bound by it. He then sued out a writ of error from this Court. This Court did not accept the judgment of the State Court as conclusive upon this question, and therefore did not dismiss the writ, or affirm the judgment, but it *reversed* the judgment, and held that the Probate proceedings were *not* binding on Scott, and that he *had been* deprived of his property without due process of law.

This case also effectually disposes of the contention made in the case at bar that the State Court merely applied the "doctrine of estoppel" to the Louisville & Nashville Railroad Company, and that this presents no federal question. Precisely this same argument was made in Scott vs. McNeal, and with much better ground to sustain it than in the case at bar. In Scott vs. McNeal the Supreme Court of the *State* in its opinion said:

"The defendants, after purchasing the property, took "possession of it and made valuable improvements. They "stand in the position of innocent purchasers, and the "question is, under this peculiar condition of affairs, which "one of the parties must suffer? The equities of the case "seem to be clearly with the defendants, for, as the matter "appears, *appellant willfully abandoned the property in*

"*question, and he certainly had reason to expect that pro-*
"*ceedings of the kind would be instituted after a lapse of*
"*years in case his relatives and other interested parties*
"*should not be able to obtain any information of his exist-*
"*ence or whereabouts.*" (5 Washington State, 309.)

When the case reached this Court, counsel for the defendant in error quoted the foregoing language of the Supreme Court of the State and said:

"These findings, if correct, are sufficient to sustain the
"judgment and *present no federal question. Their determi-*
"*nation by the State Court is therefore conclusive, and is*
"*sufficient to sustain the judgment.*"

But this Court, as we have already said, did take jurisdiction of the case and did inquire into the question of whether or not the Probate proceedings under which the property had been sold constituted due process of law.

Of course in one sense it can be said that the Court has simply applied "the doctrine of estoppel" in every case where it enforces or gives effect to a preceding alleged judgment. The doctrine of "*res adjudicata*" is but a branch of the doctrine of estoppel. Still this Court has a right to inquire, as it did in Scott vs. McNeal, whether or not the *alleged* judgment was *in reality* a judgment against the parties complaining.

In Scott vs. McNeal the Probate proceedings had been under a statute, and the State Court had necessarily passed on the validity and effect of that statute, but this Court *held that it was not bound thereby, when called on to exercise its jurisdiction under the Fourteenth Amendment of the Constitution of the United States.*

And so in the later case of C., B. & Q. R. Co. vs. Chicago, 166 U. S., 226, the Court again held that the prohibitions of

the Fourteenth Amendment apply to "all acts of the State, whether through its legislative, its executive or its judicial authorities"; and after quoting from the case of Davidson vs. New Orleans, 92 U. S., 102, to the effect that the State can not make anything due process of law which, by its own *legislation*, it chooses to declare such, then says: "The same question could be propounded, and the same answer should be made, in reference to *judicial proceedings* inconsistent with the requirement of due process of law." (Page 235.)

We therefore insist that, prior to the entry of the judgment of June 1, 1894, which the Court of Appeals has held to be a judgment against the Louisville & Nashville Railroad Company, (1) no petition had been filed aganist it—no claim made against it; (2) no process issued against it; (3) no attachment or other seizure of its property; (4) no appearance entered by it, and in fact nothing for it to appear to, (5) and that therefore the Court could not have rendered a judgment against it, if it had so desired or intended; (6) but in fact it did not render, and did not purport to render, any such judgment, but only a judgment against the Louisville, Cincinnati & Lexington Railway Company; (7) and such being the case, and the judgment, as entered in 1894, not being against the Louisville & Nashville Railroad Company, there is no process known to the law by which in 1898 it could be made, or taken to be, *a party defendant thereto*, by showing, from a supplemental investigation outside the record, that it did in fact receive the earnings for which that judgment was entered against the Louisville, Cincinnati & Lexington Railway Company; although possibly, under the circumstances, in a suit against it for those earnings, that judgment might be *evidence against it on the points therein adjudicated.* (8) It has never had a hearing or opportunity for hearing on the question of its liability to plaintiff, but only a very narrowly

circumscribed hearing on the question of whether the judgment of 1894 is a judgment against it. (9) "Whether in fact it has a defense . . . or is without defense, is not important. To assume that it has none, and, therefore, that it is entitled to no day in court, is to assume against it the very point it may wish to contest." (10) The judgment of 1898, holding that the judgment of 1894 is a valid judgment against plaintiff in error, is not binding on this Court; and the enforcement of that judgment against plaintiff in error will deprive it of its property without due process of law.

VII.

In a printed argument formerly filed by defendant in error on a motion to affirm there was a brief suggestion to the effect that the plaintiff in error, the Louisville & Nashville Railroad Company, when it filed its response to the rule to show cause why it should not pay the judgment theretofore entered against the Louisville, Cincinnati & Lexington Railway Company, had in that response pleaded to the merits as to the original question of its liability to the plaintiffs; and that the Court decided against it on such plea. *This is entirely a mistake.* No such plea was made, nor would such a plea have been received; for the only question sought to be determined on that proceeding was as to whether or not the respondent was a party to the judgment theretofore entered, and hence compellable to pay it—not the question of respondent's original liability to plaintiffs.

In support of his statement that a plea to the merits was filed, counsel quote two disconnected sentences in the fourth paragraph of the response, and argue that the respondent meant thereby to submit that it was not liable to plaintiffs, because the maker of the lease to the respondent had never

consented to the assignment of that lease to the respondent. But such was not the purpose of the allegation referred to, and neither the Circuit Court nor the Court of Appeals treated it as such, though each of those Courts delivered a written opinion on the subject of this response. The words quoted are a portion of the fourth paragraph of the response, and that whole paragraph was intended simply to show, as is manifest from reading it, that the Louisville & Nashville Railroad Company was not a *pendente lite* purchaser, and to show further the time and circumstances under which it purchased, and plaintiffs' knowledge thereof, and the continued existence of the Louisville, Cincinnati & Lexington Railway Company, by way of suggesting the theory upon which plaintiffs themselves had proceeded in suing the Louisville, Cincinnati & Lexington Railway Company, instead of suing the Louisville & Nashville Railroad Company. In other words, it was at this time being contended by plaintiff that the Louisville & Nashville Railroad Company was a *party defendant to the action*, while, on the other hand, the Louisville & Nashville Railroad Company by this response was endeavoring to show that it was not, and had never been a party to the cause, and that plaintiff *had never intended it to be a party to the cause*, but had sued the Louisville, Cincinnati & Lexington Railway Company because it was the party contracted with under the lease, and because the lessor had refused to consent to or recognize the assignment of that lease to the Louisville & Nashville Railroad Company.

As for the statement that the Court held the response on the merits insufficient, it will be seen, as suggested above, that both the Circuit Court and the Court of Appeals delivered written opinions on the subject of that response, in which *each Court purports to state the substance of the*

the Louisville & Nashville Railroad Company acquired in connection with any property referred to in the course of this litigation were, as we have seen, acquired several years *prior to the institution of this suit*, under a conveyance which was then duly recorded and of which the plaintiffs not only had notice but *actual knowledge* at the time this suit was instituted, as the response shows. (Rec., 293–295; Abstract, 50, 51.) It is manifest therefore that the judgment in this cause could not bind it as a *lis pendens* purchaser. (Dull vs. Blackman, 169 U. S., 243–248.)

MOTION TO DISMISS.

There is a pending motion to dismiss this writ for want of jurisdiction. After what we have said we do not think it necessary to add a great deal on this subject, except to show that the federal question was properly raised.

The Revised Statutes of the United States (Sec. 709) provide:

> "A final judgment or decree in any suit in the highest "Court of a State in which a decision in the suit could be "had . . . where any title, right, privilege or immunity "is claimed under the Constitution . . . of . . . . "the United States, and the decision is against the title, "right, privilege or immunity specially set up or claimed "by either party under such Constitution . . . may "be re-examined and reversed or affirmed in the Supreme "Court upon a writ of error."

In Chicago, Burlington, etc., R. Co. vs. Chicago, 166 U. S., 226, an effort was being made to condemn a right of way for a street across the right of way of a defendant railroad company. There was a verdict and judgment of condemnation, fixing the damages to the railroad company at one dollar. On motion for a new trial it claimed that its property would

by this judgment be taken without due process of law. The motion was overruled. The judgment was, on appeal, affirmed. A writ of error from this Court was allowed. A motion was made to dismiss, and this Court said:

"If the right now asserted under the Constitution of "the United States was specifically set up or claimed by "the defendant in the State Court, the motion to dismiss "must be overruled. (Rev. Stats., Sec. 709.)

"Now the right in question was distinctly asserted by "the defendant in its written motion to set aside the ver- "dict and grant a new trial. . . .

"When the trial Court overruled the motion for a new "trial and entered judgment, it necessarily held adversely "to these claims of federal right. . . . The judgment of "affirmance necessarily denied the federal rights thus "specially set up by the defendant, for that judgment "could not have been rendered without deciding adversely "to such claims of right. Those claims went to the very "foundation of the whole proceeding, so far as it related "to the railroad company, and the legal effect of the judg- "ment of the Supreme Court of the State was to deny "them. . . . There is, we conceive, no room to doubt that "the legal effect of the judgment below was to declare "that the rights asserted by the defendant under the "National Constitution were not infringed by the proceed- "ings in the case, consequently the motion to dismiss for "want of jurisdiction must be overruled."

In the case at bar the very first time that any semblance of process was issued against the present plaintiff in error, the very first time it was called on to speak, and before any order was ever made against it, except the order for the issuance of a show-cause rule, it responded and especially set up and claimed a right under the Federal Constitution in unmistakable terms as follows, viz.:

"The Louisville & Nashville Railroad Company, for "response to the rule against it herein. . . . says:

First. "That it is not a party to this suit. It has not "been named in any pleading in the case as a party, and "there is no averment made in any pleading in the case "against this respondent or that is applicable to this respond- "ent, and no judgment or order has ever been entered in "this case against this respondent, and no process has ever "issued against or ever been served on this respondent.

Second. "There has never been a time from the insti- "tution of this suit up to this time when this respondent "could, with propriety, have filed an answer setting up its "defenses against the alleged claim of the plaintiff, and *to* "*require it now to pay into Court upon this rule the amount* "*stated in the rule, or any other amount, would be to deprive* "*this respondent of its property without due process of law,* "*contrary to the Constitution of the United States in such* "*cases made and provided.*"

This specially set up and claimed a right under the Federal Constitution as plainly as could possibly have been done, and when the Circuit Court adjudged this response "*insufficient*," and made the rule absolute, and ordered the respondent to pay into Court the amount named in the rule, this was a denial of the federal right claimed in the response.

There was no assignment of errors in the Court of Appeals, because there is no such thing known to the law of the State. An appeal takes up the whole case and all rulings made by the trial court. And when the Court of Appeals affirmed the judgment of the Circuit Court, holding the response insufficient, making the rule absolute, and ordering the respondent to pay into Court the amount named in the rule, it necessarily denied the federal right claimed in the

response. And, as said by this Court in the case cited, that claim of right "went to the very foundation of the whole proceeding," and the judgment of affirmance "could not have been rendered without deciding adversely to such claims of right." There was no other ground on which the decision was or could have been rested. If that claim of right had been sustained it would necessarily have resulted in a reversal of the judgment with directions to discharge the rule.

To adopt again the language of the opinion cited:

> "There is, we conceive, no room to doubt that the legal "effect of the judgment below was *to declare that the rights "asserted by the defendant under the National Constitution "were not infringed by the proceedings in the case.* Conse- "quently the motion to dismiss for want of jurisdiction "must be overruled."

As to whether or not the property of plaintiff in error is, by this judgment, taken "without due process of law," as to whether the judgment shall be affirmed or reversed, is a question involved in the consideration of the final merits of the case. But as to the jurisdiction—"the power to hear and determine" this question so distinctly made in the State Court by plaintiff in error, and so clearly decided against it—we can perceive absolutely "no room to doubt."

Counsel say the decision of the State Court was based upon a "question of procedure." But we say that "procedure" was not "due process of law." When a subject of the Sultan of Turkey is sewn up in a bag and quietly dropped into the Bosphorus, under cover of night, without a chance to ask "Why," this may be said to be a "matter of procedure;" but it is not such procedure as in Anglo-Saxon countries would pass for "due process of law." When George Jeffreys presided at the "Bloody Assize," he was the Chief Justice of

England, and hundreds of men lost life, liberty or property by process of law; but Englishmen have never believed that the judicial tragedies of that dark day were accomplished by *due* process of law. In Murray's Lessee vs. Hoboken Land Co., 18 Howard, 272–276, this Court said: "That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' . . . It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and can not be so construed as to leave Congress free to make any process 'due process of law' by its mere will." In the much later case of Davidson vs. New Orleans, 96 United States, 97–102, in speaking again of process which had been provided by legislative act, this Court said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation." And in the very recent case heretofore cited of Chicago, Burlington, etc., R. Co. vs. Chicago, 166 United States, 226–235, this Court, after quoting the language which we have just quoted from Davidson vs. New Orleans, said: "*The same question could be propounded, and the same answer should be made in reference to* JUDICIAL PROCEEDINGS *inconsistent with the requirement of due process of law.*" Manifestly it is no bar to a consideration of the question which we have submitted to this Court, to say that it is merely a "question of procedure." There lies a deeper question, and it is this: Was that procedure or process "*due* process of law?"

But counsel say the federal question was not "*seasonably* raised." They say "the opinion of the Court of Appeals

announcing the doctrine" of which we complain was delivered in 1896, and there was no claim of federal right till March 21, 1898. Counsel well speak of this as a "doctrine"; it certainly was not a judgment, as the Court itself conceded. But it was not that enunciation of a "*doctrine*" that deprived plaintiff in error of its property; it was the subsequent entry of a *judgment* in the Circuit Court and its subsequent affirmance in the Court of Appeals. And, as we have seen, before any such judgment was entered, and the very first time plaintiff in error was called on to speak, it specially set up and claimed this federal right.

Counsel lay stress on the case of Iowa Central Railway Co. vs. Iowa, 160 United States, 389. It there appeared that a suit was brought at the instance of the people of a certain community, against the Central Iowa Railway Company, to compel obedience by it to an order of the Railway Commissioners of the State requiring it to operate a certain portion of its road. In due time a judgment was entered ordering the operation as prayed for. Thereupon an appeal was taken to the Supreme Court of Iowa. *After the entry of the judgment by the Court of original jurisdiction* requiring the operation of the road, and while the appeal was pending in the Supreme Court, foreclosure proceedings were begun against the Railway Company; and in course of time the mortgage was foreclosed and the property sold, which sale took place just a month before the judgment of affirmance in the Supreme Court of Iowa. All the proceedings in the foreclosure case had taken place after the judgment of the lower Court, and pending the appeal in the Supreme Court. There were one or two conveyances after this judicial sale, and the property soon came into the hands of a corporation evidently organized for the purpose of taking the property, and which was called the Iowa Central Railway Company.

It paid no attention to the order for operation of the road; and thereupon the Attorney General filed in the Supreme Court of Iowa a petition for a mandatory injunction against this new corporation as the successor, assignee and grantee of the original defendant, the Central Iowa Railway Company, praying that it might be compelled to obey the mandate and order of Court. To that petition an answer was filed by the Iowa Central Railway Company, denying in a qualified manner that it was the successor, assignee or grantee of the original defendant, but stating facts which clearly showed that it was such. Thereupon the Attorney General moved for a judgment on the petition and answer on the ground that the answer presented no defense at all. The Supreme Court sustained this motion, delivering a written opinion which is shown in the record in that cause on file in this Court, in which it pointed out that the decree in the original cause expressly ran against "the Central Iowa Railway Company, its officers agents and servants, its *successors*, *assigns*, *lessees*, and each and every thereof;" and that while there was a qualified denial by the new corporation that it was such successor, assignee or grantee, yet the facts alleged showed beyond a doubt that it was such; and that it was therefore bound by the decree. It is difficult to see how there could be any doubt about the validity of the proceeding in question. The Iowa Central Railway Company, however, sued out a writ of error from this Court, which afterward dismissed the writ.

The manner of attempting to raise the federal question, as set forth in this Court's opinion, would seem to have been sufficient of itself to justify the dismissal of the writ. The Court says:

> "Nowhere in the answer or in the amendments to the "answer filed on behalf of the company was it claimed

"that the proceeding was violative of the Constitution of "the United States, or assailed any right, title, privilege "or immunity specially set up or claimed under that Con- "stitution. Indeed there was no mention of any right "thereunder *until the filing of a brief* for defendant en- "titled 'Defendant's resistance and objection to plaintiff's "motion to enter order prayed for in the petition,' in the "ninth clause whereof it was claimed that it would be a "violation of the Fourteenth Amendment of the Constitu- "tion of the United States to grant the order prayed for "upon the motion in question."

The argument of the counsel for plaintiff in error, as appears from his brief on file, was devoted in the first place to an elaborate examination and quotation of various statutory provisions in the Code of Iowa relating to actions of mandamus, which he contended had not been observed, a question with which, of course, this Court had nothing to do. He also argued that it was improper for the Court to sustain a *motion for a judgment* simply on the petition and answer, but that the Attorney General *ought to have demurred to the answer.* He also insisted that his client was entitled to a jury trial, a question which, of course, has no application to the case at bar. The Court does, in its opinion, speak of what constitutes due process of law, but the view which it took as to what was the real question submitted to it for decision, is clearly stated in the following paragraph near the close of the opinion:

"It is manifest that it was never contemplated by the "framers of the Constitution that this Court should sit in "review, as an Appellate Court, of such a question as that "presented by the record in the case at bar, to-wit: "*Whether or not the highest Court of a State erred in*

"holding that it could rightfully determine from the state-
"ments in the pleadings, filed by both parties to a contro-
"versy pending before it, that the averments of an answer
"set forth no defense to the claim of the plaintiff."

It seems to us that the State Court in its opinion showed beyond possible doubt from the answer of the defendant that it was the successor and grantee of the original defendant under a purchase actually made after the original decree was entered, and that it was unquestionably bound by it. And as to the question of practice, as to whether a Court could enter judgment for the plaintiff because the answer presented no defense, without first requiring a demurrer to be filed to the answer, this was so manifestly within the power of the Court, and it was so entirely plain that this presented no federal question, that it seems to us it could have presented no ground for serious dispute.

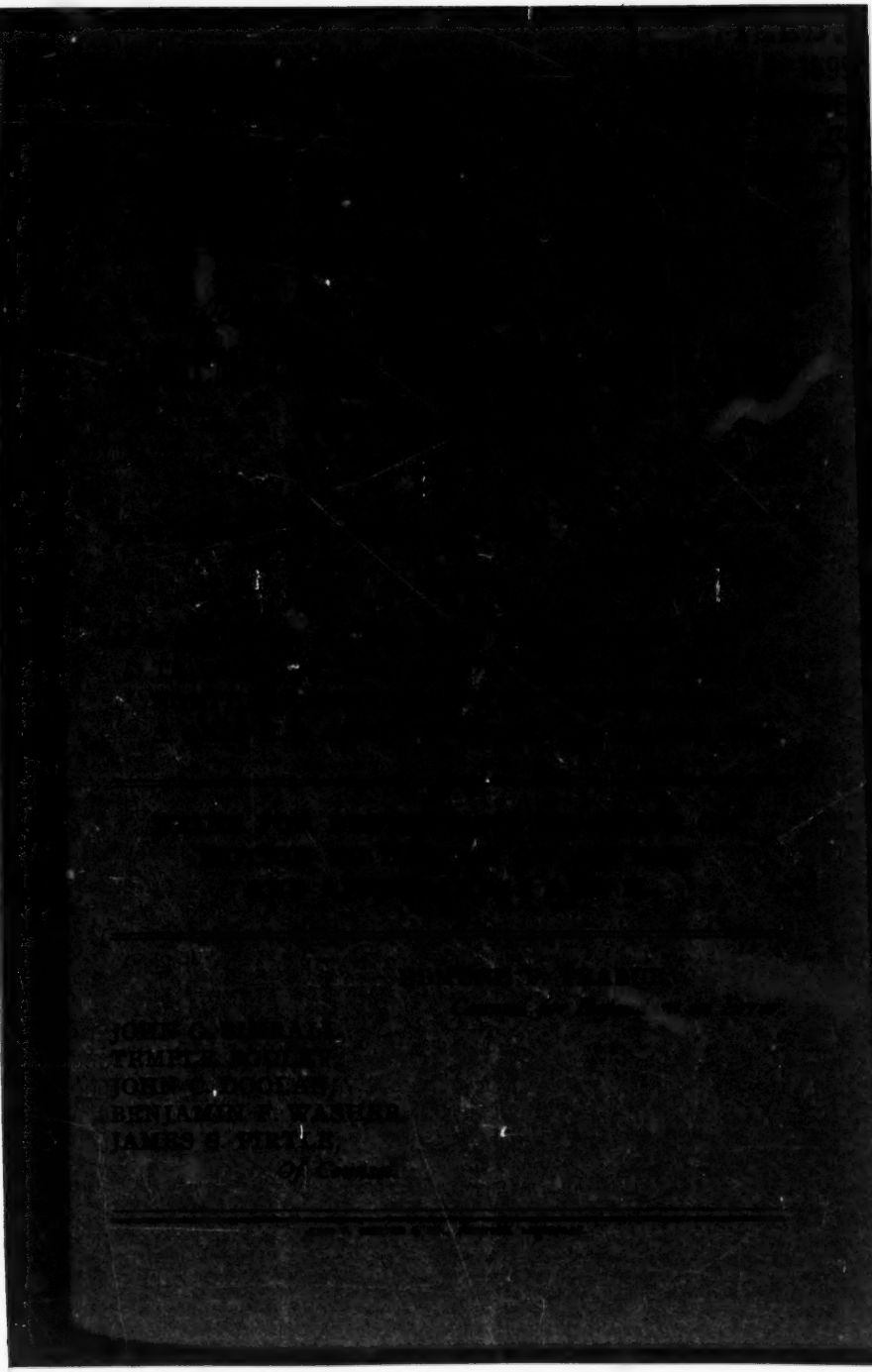
In the case at bar the federal question was presented and stated in the record at the very first opportunity; it was presented so clearly and distinctly that no one could misunderstand or overlook it; and in fact it was really *the only question* presented by the response of the Louisville & Nashville Railroad Company, when for the first time in the litigation it was called on to speak.

CONCLUSION.

We submit that the judgment should be reversed, with directions to dismiss the proceedings against plaintiff in error.

JAMES P. HELM,
HELM BRUCE,
Counsel for Plaintiff in Error.

H. W. BRUCE,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This case is on motion under Rule 6 to dismiss for want of jurisdiction, or affirm. Plaintiff in error contends that the judgment of the Circuit Court affirmed by the Court of Appeals of Kentucky, deprives plaintiff in error of its property without due process of law. (Rec. 323.) The facts are elaborately stated by our colleague.

The judgment assailed was entered April 2, 1898, and affirmed by the Court of Appeals as a "delay case," October 28, 1898. (Rec., pp. 308 and 317.)

The amount of the judgment represented the earnings of the Louisville, Cincinnati & Lexington Division of the railway system of plaintiff in error, made on the traffic supplied to it by the Northern Division of the Cumberland & Ohio Railroad. The earnings were, by said judgment, subjected to a lien created

thereon by a mortgage executed July 2, 1879, by the Louisville, Cincinnati & Lexington (hereinafter called L. C. & L.) Railway Company, former owner of said division of said railway system (Rec. 14); and this suit was instituted by the trustee in said mortgage to enforce a lien on said earnings.

In the opinion pursuant to the mandate whereof the judgment of April 2, 1898, was entered, the court said:

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellant's claim the net profits on business coming to the line of the Louisville, Cincinnati & Lexington R'y Co. from and over the Cumberland & Ohio."

The opinions (see stipulation, Rec. 319, item 35) are reported in 95 Ky. 291; 99 Ky. 143, and 19 Ky. L. R. 1626, and the last two are appended.

The defendants in error are holders of bonds secured by the aforesaid mortgage of earnings, and a mortgage on said Northern Division of the railroad of the Cumberland & Ohio (hereinafter called C. & O.) Railroad Company. The latter company, in 1879, executed said mortgage, and then leased its railroad to the Railway Co. which, as further security for the payment of interest upon and sinking fund to retire the bonds, executed said mortgage upon the net earnings accruing from freight supplied to it by the lessor. (Rec. 12, 20, 25, 27.)

November 1, 1881, the L. C. & L. R'y Co. conveyed its railroad and other property to plaintiff in error, and in the deed of conveyance assigned and transferred the aforesaid lease, which was accepted by the grantee, who expressly assumed its obligations. (Rec. 270.) Prior thereto, the grantee had purchased all the grantor's capital stock. (Rec. 271.)

Since the purchase the plaintiff in error has operated the properties purchased and the Northern Division of the C. & O. R. R. and taken the earnings thereof. (Rec. 271.)

This suit was instituted October 12, 1885, by defendant in error, A. L. Schmidt, as bondholder and trustee in the mort-

gage against the lessee of the railroad and mortgagor of the earnings (Rec. 1), to subject the net earnings covered by the mortgage. (Rec. 13.)

Since its institution the suit has been fought stubbornly in the trial court and Court of Appeals—having made five trips to the latter court—and a record of many thousand pages at enormous expense has been accumulated in depositions, reports of railway earnings, etc., etc. (Rec. 38, 60, 87, 90, 142, 146, 166, etc. etc. Stipulation 319.)

After over eight years litigation, the Court of Appeals settled in Schmidt, Trustee, v. R'y Co., 95 Ky. 271, Feb. 8, 1894, the proper mode of computing the earnings covered by the mortgage, which was the gist of controversy.

On return of the case to the Circuit Court, the L. C. & L. R'y Co. responsive to a rule to pay into court the amount adjudged, said:

"That in 1881, it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it.

"HELM & BRUCE, *Att'ys. for Def't.*"

"The affiant, G. H. Ellis, states he is the Secretary of the defendant Louisville, Cincinnati & Lexington Railway Co., and is the chief officer of said Company now in the State of Kentucky, and that he believes the statements of the foregoing response to be true." (Rec. 215.)

To the rule to report the amount of the net earnings accruing after the period within which the net earnings adjudged as aforesaid accrued, said Company said that it

"States and shows to this court that it has not made any net earnings or earnings of any kind since the date aforesaid on business coming to it from or over the Cumberland & Ohio road,

nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid. HELM & BRUCE, *Att'ys. for Def't.*

"M. H. Smith says that he is the President of the defendant and that he believes the statements contained in the foregoing response are true." (Rec. 217.)

The respondent did not name its vendee, but it was, as aforesaid, the Louisville & Nashville Railroad Company, plaintiff in error.

The record affirmatively shows (p. 79) that *plaintiff in error* was defending the suit:

"At a Court held for the Court aforesaid, on the 20th day of April, 1891—

"Came Barnett, Miller & Barnett and filed a written notice in this action duly accepted.

"And on their motion their names are stricken from the record herein as attorneys for Louisville & Nashville Railroad Company.

"Said notice is in words and figures as follows, to-wit:

Louisville Law and Equity Court,

Schmidt, - - - - - - - - Plaintiff,
vs.
L., C. & L. R'y Co., - - Defendant. } No. 1860. Notice.

"The Louisville & Nashville Railroad Company will take notice that on Monday, April 20, 1891, at the motion hour, we will move the Court to strike our names from the record herein as attorneys for said Company.

"BARNETT, MILLER & BARNETT."

This notice was accepted by present counsel for plaintiff in error as follows:

"Notice accepted.

"HELM & BRUCE,
"Attorneys for Def't."

Promptly after taking charge of defense said Helm & Bruce proceeded to take the depositions of the divers officers of plaintiff in error:

Of M. H. Smith, who verified the response (Rec. 217), and who swore that he was the "President of the Louisville & Nashville Railroad Co."

Of Edward Rowland (Rec. 174), "Auditor of Receipts of the Louisville & Nashville Railroad."

Of Charles Haydon (Rec. 174), "Assistant Comptroller of the L. & N. Railroad."

The report forming the basis of the decision in 95 Ky. 289, was by Mr. Helm exhibited to witness, and he inquired "whether this report was taken from the records of the Louisville & Nashville Railroad office under your supervision, and whether you know it to be correct." Haydon responded: "Yes, sir; this account was made out in my office, and was taken from the books."

R. E. Sewell, who made said report, was "Auditor of Disbursements of the Louisville & Nashville Railroad Co." (Rec. 72.)

When the responses of the L. C. & L. Railway Co. were held sufficient, defendants in error tendered an amended petition (Rec. 224), wherein they stated, in substance, that, after the execution of the lease and mortgage aforesaid, of which plaintiff in error had full notice, viz., about November 1, 1881, said lessee conveyed all its property to plaintiff in error, and assigned to it said lease.

That prior thereto the grantee had acquired all the capital stock of the grantor, and after the sale operated the properties purchased and leased, and took the rents and profits thereof, and knew that the earnings mentioned in the petition in this suit referred to the earnings made in the operation of the properties purchased; also that it filed the answer in this suit in the name of the Louisville, Cincinnati & Lexington Railway Co., and filed all other papers which were filed on behalf of the defense, and employed counsel to make the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and introduced all the witnesses who testified on behalf the defense, and had been in court defending the action, and had controlled the defense

thereof continuously from the time the summons on the original petition was served on Milton H. Smith, who was its President, etc. (Rec. 233.)

From the order refusing leave to file the amended petition defendants in error appealed to the Court of Appeals, which delivered the opinion reported in 99 Ky. 143. (See Appendix.)

The Appellate Court therein, p. 148, said:

"It is earnestly contended by counsel for appellants that the rule laid down in Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638, following and amplifying the doctrine announced in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, applies to this case and is decisive of it. Appellants claim that the Louisville & Nashville Railroad Co. was the real defendant in this case, made the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and is bound by the judgment.

"This appeal, therefore, presents two questions for decision: First, whether, upon the facts alleged in the amended petition and disclosed by the record, the Louisville & Nashville Railroad Co. is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellants' claim.

"Upon the first question there is little difficulty," etc.

After elaborate discussion of the authorities the Court said (p. 155):

"But we are of opinion that after the appeal and judgment in this case it would be too late to bring into this litigation one who was neither a party to the record nor bound by the judgment. In our view the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for upon the theory of that amendment, and considering the facts therein stated to be true, that Company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that Company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment." (See amendment.)

On return to the lower court, defendants in error adopted the second alternative suggested in the opinion, and filed an affidavit stating the facts alleged in said amended petition (Rec. 262), and asked a rule against plaintiff in error to pay into court the amount ascertained by the judgment, which was denied, and said defendants again appealed. (Record, 288.)

The judgment of the lower court was reversed January 14, 1898. (Rec. 290.)

On return of the case to the Circuit Court, said defendants renewed their motion for a rule against the plaintiff in error to pay into court the amount of the judgment aforesaid, and their motion was, pursuant to the mandate of the Court of Appeals, sustained. (Rec. 292.)

In response to the rule, plaintiff in error, for the first time, undertook to raise the Federal question. (Rec. 294.)

From the judgment requiring plaintiff in error to pay into court the amount adjudged, it appealed to the Court of Appeals. (Rec. 308–9.)

The judgment of the lower court, entered pursuant to the mandate of the Court of Appeals, was affirmed as a "delay case" October 27, 1898 (Rec. 317), and this writ of error was prosecuted.

POINTS.

Our motion should prevail, because:

1. Had a Federal question existed, it would have been waived, not having been seasonably raised.

2. This Court is without jurisdiction, because the basis of the State Court's decision was not a Federal question; but a question of general equity jurisprudence, *viz:* if plaintiff in error was estopped by its own acts to deny that it was a party defendant to this suit.

3. The question of procedure urged as a Federal question involves no Federal question, but one of State practice, which this Court will not control.

4. The question which plaintiff in error seeks to raise has been so often decided against its contention by this Court as to have become frivolous, and its advocacy to indicate an intention to urge it for delay merely.

I.

There was no suggestion of a Federal question until March 21, 1898 (Rec. 294), and the opinion of the Court of Appeals announcing the doctrine which plaintiff in error now claims infringes its Constitutional rights was delivered April 4, 1896. (Rec. 238.)

The opinion was delivered on the motion to file the amended petition, and shows that the motion was resisted not on any Constitutional point, but solely on a point of practice, viz: That after judgment new parties could not be made to a record.

Even in the elaborate petition for modification of the opinion filed May 5, 1896 (Rec. 238), wherein plaintiff in error reviewed and combated the doctrines of the opinion, no Federal question was raised; consequently it was waived. Even had the question been raised in the petition for modification it would have been waived, being too late, as has been often decided by this Court. Miller v. Texas, 153 U. S. 539; Bushnell v. Crooke Mining, &c., Co., 148 U. S. 689; Butler v. Gage, 138 U. S. 52; T. & P. R'y Co. v. South. Pac. Co., 137 U. S. 48; Pim v. St. Louis, &c., Co. 165 U. S. 273; Miller v. Railroad Co., 168 U. S. 131; Union, &c., Co. v. Kirchoff, 169 U. S. 103.

II.

The State Court did not decide that plaintiff in error was bound by the judgment without being a party to the suit or being heard; but held that, assuming "the facts therein (the amended petition) stated to be true, that Company was already a party defendant and bound by the judgment."

As appears in the STATEMENT, the record and admitted facts show not only that plaintiff in error had a hearing in this suit, but that it was substantially the only person that was heard. It had had a hearing for over eleven years when that opinion was delivered.

As is above shown, the suit was prosecuted vigorously from its commencement, October 12, 1885, an enormous record was accumulated, many thousands of dollars expended, the Louisville & Nashville R. R. Co.'s "President", "Auditor of Disbursements", "Assistant Comptroller", "Auditor of Receipts", etc., etc., were introduced as witnesses, and stated the account of earnings from its own books, and during all that time the L., C. & L. R'y Co., by the oath of M. H. Smith, President of the Louisville & Nashville Railroad Company, had not only made none of the earnings mentioned in the voluminous reports, but had not made "earnings of any kind;" and had not owned any railroad, or any "property of any character whatever" after November 1, 1881, nearly four years before this suit was instituted.

The facts, as admitted by the Louisville & Nashville R. R. Co. and recited by the Court of Appeals in its opinion (99 Ky. 147), were:

"That in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that by that deed the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co., the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads, both the Cumberland & Ohio and Louisville, Cincinnati & Lexington Companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincin-

nati & Lexington Railway Co. that the Louisville & Nashville Co. not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in accordance therewith until April, 1883, and knew that the earnings referred to were made on the operations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; that the Louisville & Nashville Co. filed an answer herein in the name of the Louisville, Cincinnati & Lexington Co., employed counsel to make defense, and has controlled the defense in this case from the time of service of process."

Accordingly, it appears from the uncontroverted facts and previous proceedings, that the actual controversy and strife was between the plaintiff in error and defendants in error, for the L. C. & L. R'y Co. had parted with every vestige of property, and had only a nominal existence. That this fact was so well recognized by plaintiff in error that its own counsel in withdrawing from the defense of this suit, gave *to it* notice of the motion to strike their names from the docket as *its counsel*, and that its other counsel who are representing it in this Court, accepted the said notice in the name of the "Def't." It is, therefore, demonstrated that the contention of the existence of a Federal question is but an after-thought, and implies that the litigation extending throughout so many years was really no litigation, but a myth; that the record actually determines no question of property, not of the L. C. & L. R'y Co.'s property, for confessedly it never had any property after 1881, and not of defendants in error's property, because if its adversary was not bound, *it* was not bound.

Plaintiff in error, therefore, stands in this Court upon the contention that it has for nearly 14 years perpetrated a farce upon the Courts of Kentucky at enormous cost to the State, to defendants in error, and, undoubtedly, to plaintiff in error, with the deliberate purpose of procuring a judgment in the name of another, that would settle nothing. It is upon such contention as a basis that it now claims that rights guaranteed by the Federal Constitution have been infringed.

As aforesaid, the State Court did not bind plaintiff in error without a hearing, but basing its decision upon its previous decision in two cases, in which plaintiff in error was a party (for no other litigant ever raised such a question in Kentucky), viz: Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, and Heckman v. Louisville & Nashville Railway Co., 85 Ky. 638, said:

"This appeal, therefore, presents two questions for decision. First, whether upon the facts alleged in the amended petition and disclosed by the Record, the Louisville & Nashville Railroad Co. is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellant's claim."

The Court further said, p. 155:

"In our view, the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for, upon the theory of that amendment, and considering the facts therein stated to be true, that Company was already a party defendant and bound by the judgment."

Regarding procedure, the Court said:

"The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that Company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment."

So, from the Court's own statement of the basis of its decision, it appears not only that plaintiff in error was not held bound by the judgment without a hearing, but that said plaintiff *in error*, upon facts which it admitted to be true, had defended a suit in the name of another company, and was for that reason bound by the judgment.

When plaintiff in error recognized, as the court finds it did recognize that the railroad earnings mentioned in the petition were the earnings of the properties acquired by it from the L., C. & L. R'y Co. it had the choice between petitioning the Court to be made a party defendant and asserting such defenses as it chose in its own name, and making in the name of the L., C. & L. R'y Co., such defenses as it might make in such name, under the doctrine settled previously by the Court of Appeals in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 138, and Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638. Plaintiff in error knew, for it was a party in both cases in which the doctrine was settled, that if it defended the suit in the name of the party to the record, it would be bound by the result, and, nevertheless, elected to defend in that name, and the State Court simply held, as it had held in the two previous cases, that plaintiff in error was bound by the result of the suit, and estopped by its own acts to deny that it was a party ligitant therein.

The question arising, therefore, upon the record is not a Federal question, but a question of general equity jurisprudence, viz., whether or not plaintiff in error was estopped by its own acts, admitted of record, to deny that it was a party to the suit. This question of estoppel was not a Federal question, as has been often decided by this court.

A case in point is Pierce v. Somerset Railway, decided October 31, 1898, Advance Sheets. The case was before this Court on a writ of error prosecuted by bondholders, who claimed that their rights were infringed by statutes enacted after the execution of their mortgage, authorizing the re-organization of the railroad company and the readjustment of its properties.

This Court, after stating the case, said:

"It is thus seen that there were two questions determined by the State Court: One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a Federal

question. The other related to the defense of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the State Court. In such case a writ of error to the State Court can not be sustained. *Eustis v. Bolles*, 150 U. S., 361; *Rutland Railroad Co.* v. *Central Vermont Railroad Co.*, 159 U. S. 630; *Seneca Nation* v. *Christy*, 162 U. S. 283.

"A person may by his acts, or omission to act, waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

In Michigan v. Railroad Co., 152 U. S. 368, this Court said:

"The Supreme Court of Michigan held that the State might be estopped by its acts, conduct, silence, and acquiescence; that the only question necessary to be considered and determined was the question of estoppel; and, after a full consideration of the facts applicable to this branch of the case, reached the conclusion that the claim of the State had no foundation in equity, justice, or good conscience; that it had become stale; and that the State was estopped to assert title in itself to the lands in question. As its judgment thus rested upon the decision of a question which was not Federal, this Court has no jurisdiction to review it, and the writ of error must be dismissed. *Adams County v. Burlington & M. R. Co.*, 112 U. S. 123; Israel v. Arthur, *ante p.* 355. Writ of error dismissed."

Israel v. Arthur, *supra*, affords an excellent exemplification of the principles we invoke. Abbie A. Israel claimed the estate of John Arthur, as his widow. He had obtained a divorce which had been held void for want of jurisdiction of the Court decreeing it. John Arthur's representatives admitted the right of Abbie A. Israel to repudiate the divorce for want of process on her. She had remarried, however, after the decree, and the State Court held that by invoking the right of remarriage under the decree of divorce, she was estopped to assert the nullity of the decree for want of notice of the proceedings.

This court, after reciting that plaintiff in error admitted that conceding the invalidity of the divorce "the only question to be tried was whether she was 'estopped by her conduct as alleged in

said answer to dispute or contest the validity of said decrees, or whether she has ratified them by her conduct.'

"That question was determined against her, and the judgment rested solely on the ground that she could not under the facts be allowed, as to John Arthur's personal estate, to assert the property rights conferred by law upon a widow. To review that judgment would be to overhaul the application by a State court of principles of public policy and of 'estoppel, which it is not within our province to do. This was so held in *Marrow* v. *Brinkley*, 129 U. S. 178, and in effect in many other cases. *Adams County* v. *Burlington & M. R. Co.*, 112 U. S. 123; *Choteau* v. *Gibson*, 111 U. S. 200; *Beaupre* v. *Noyes*, 138 U. S., 397.

"In *Eustis* v. *Bolles*, 150 U. S. 361, it was ruled that a decision by the Supreme Judicial Court of Massachusetts that a creditor of an insolvent debtor, who proved his debt in insolvency proceedings under the State Statutes and accepted the benefits thereof, thereby waived any right he might otherwise have had to object to the validity of the insolvency statutes as impairing the obligation of contracts, presented no Federal question for review. And it has been often held, at least in actions at law, that this Court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. *Dower* v. *Richards*, *ante* p. 658, and cases cited.

"*Writ of error dismissed.*"

In Eustis v. Bolles, just cited, after reviewing the authorities, this court said, p. 368:

"The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors, notwithstanding their discharge.

"In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of Clay v. Smith, 28 U. S. 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his

dividend under the insolvency proceedings was such a waiver, the Court below did not decide a Federal question. Whether that view of the case was sound or not is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question."

In Electric Co. v. Dow, 166 U. S. 489, this Court held that a decision of the State Court that a party electing to have damages assessed by a jury pursuant to the permission of a State statute was estopped to contest the validity of a provision of the statute for the addition of 50 per cent to the verdict did not present a Federal question.

See, also, San Francisco v. Itsell, 133 U. S. 65; Gillis v. Stinchfield, 159 U. S. 658; Bacon v. Texas, 163 U. S. 227, etc., etc.

From the principles settled in the foregoing cases it is demonstrable upon a bare perusal of the opinion of the Kentucky Court that this writ of error is not maintainable, and should be dismissed because the decision of the State Court was based upon a question of general equity jurisprudence sufficient to sustain the judgment of that court, independent of any Federal question which might have been raised or decided.

III.

The motion to dismiss should prevail also upon the ground that the decision of the State Court was based upon a question of procedure arising under the State practice.

In the opinion of January 14, 1898 (Appendix II), the Kentucky Court said:

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington R'y Co. from and over the Cumberland & Ohio. If the averments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville,

Cincinnati & Lexington R'y, by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit in the name of the Louisville, Cincinnati & Lexington R'y Co.; and was a real defendant in this action. Assuming these averments to be true, the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action.

"After a careful consideration of this question it seems to us that the question whether the Louisville & Nashville R. R. Co. has had its day in court in this suit can be as well determined in this suit as in another. If the Louisville & Nashville R. R. Co. is a party to this suit it is so because it has, as assignee of the contract and owner of the property of the Louisville, Cincinnati & Lexington Ry. Co., obtained the net earnings and conducted the defense of this suit, and the truth of these averments can be ascertained upon rule and response, and the payment of the earnings received be compelled as the production of mortgaged property might be compelled in ordinary proceedings to enforce liens.

"We deem it unnecessary to consider the question whether a personal judgment could have been rendered against the Louisville & Nashville R. R. Co. had it been a nominal defendant upon the averments of the original petition."

This decision of a question of procedure of the Kentucky Courts is not reviewable by this court, although it determined that the question whether or not plaintiff in error was a party to the suit by reason of its possession of the subject matter thereof and its acts in conducting the defense of said suit, etc., might be tried upon rule and response. The decision in Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, is in point, and quite as strong a case in favor of jurisdiction as this, but the writ was dismissed.

The Central Iowa Ry. Co. had acquired the railroad of the Central Railway Co. of Iowa and leased it to the Burlington Co., which had taken exclusive possession thereof. Citizens of Northwood obtained an order of the Railroad Commissioners

that the Central Iowa Co. operate the road. The Court decreed compliance with the order, and enjoined the Burlington Co. from operation. Pending the litigation foreclosure proceedings were begun and completed in the Federal Court against the Central Iowa Ry. Co. The purchaser at foreclosure sale assigned to plaintiff in error. Afterward the Attorney General obtained a mandatory injunction against plaintiff in error to obey the order made against the Central Iowa Co. Plaintiff in error answered that it was no party to the suit wherein the order was made, that the Central Iowa Co. was virtually dead at the time, that plaintiff in error was not its successor, and that no injunction should go against it until after regular hearing. This Court said that no suggestion of a Federal question was made until in a brief, "in the 9th paragraph whereof it was claimed that it would be a violation of the 14th Amendment of the Constitution of the United States to grant the order prayed for upon the motion in question."

"It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words. Whether the Court of last resort of the State of Iowa properly construed its own Constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of State law, binding upon

this Court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the State empowered by the laws of the State to review and correct errors committed by its Courts. Such errors affect merely matters of State law and practice in no way depending upon the Constitution of the United States or upon any act of Congress. Ludeling v. Chaffe, 143 U. S. 301, 305."

The ruling in this case is conclusive of the case at bar, for the contention in each case was that the proceeding against the plaintiff in error to compel it to perform a judgment which it claimed was rendered against another person was without due process of law. The difference between the cases is that in the case cited the purchaser had never been heard, but in this case the Louisville & Nashville R. R. Co. was practically the only party that ever had been heard. We submit the question without further argument. See, also, Wilson v. North Carolina, 169 U. S. 586; McQuade v. Trenton, advance sheets, decided January 30, 1899.

IV.

The Question Which Plaintiff in Error Attempts to Raise has Long Been so Conclusively Settled Against its Contention that it is no Longer Open for Argument.

Its contention is that although it actively carried on a litigation for many years with defendants in error over property which it claimed to own, and denied the right of defendants in error to subject it to the payment of their claim, it is not bound by the litigation because it was not named as a party to the record, but defended the suit in the name of a corporation which had parted with every thing except its name years before the institution of the suit.

The obvious answer to its contention is:

1. This proceeding being in its nature *in rem*, to subject the earnings or profits of property within its territory, the question

of procedure, including that of notice to the parties to be bound by the judgment or decree, is exclusively within the control of the State, personal notice not being required to constitute due process of law, as in actions *in personam.*

2. Due proces of law does not forbid a person being bound by the judgment in a case in which it has controlled the defense in the name of a party appearing of record.

(*a*)

The judgment affirmed in the Court of Appeals did not purport to bind plaintiff in error, except "to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Company out of business coming to it from or over the Cumberland & Ohio." (99 Ky. 149.)

Accordingly, to subject such "net profits accruing from the lines," etc., the proceeding, *which was one to enforce the mortgage*, was in its nature *in rem*, and it was so held in this suit. The Court said, as above quoted: "In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Railway Company from and over the Cumberland & Ohio."

The case, therefore, is one in which it was conceded in Pennoyer v. Neff (95 U. S. 718) that formal personal notice or summons was not indispensable to due process of law. The language used was:

"So the State, through its tribunals, may subject property situated within its limits, owned by non-residents, to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled."

Regarding "substituted service by publication," this Court said:

"Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or

of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*," etc.

These principles are too familiar to admit of our further discussion of them.

That the decision of the State Court that this suit is a proceeding *in rem* within the doctrine of Pennoyer v. Neff is sound is too obvious for argument; but if it were doubtful, the adjudication of the State Court as to the nature of the proceeding is conclusive. In Wood v. Brady, 150 U. S. 23, this court said:

"The question whether an action to foreclose a lien of this kind is *in rem* or *in personam*, under the practice in California, is one upon which the decision of the Supreme Court is binding, and its ruling that plaintiff, being no party to defendant's suits to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a proper subject for review by this court.

"In no aspect does the case present a Federal question, and the writ is, therefore, dismissed."

(*b*)

The doctrine asserted for the *third* time, by the State Court (99 Ky. 149) as established in Kentucky, is supported by authority practically unanimous, as is shown in the opinion itself; see appendix I.

The same doctrine is asserted to be sound by the text-writers, Freeman on Judgments, Sec. 175; Black on Judgments, Secs. 539, 540; Herman on Estoppel, Sec. 156; Van Fleet Form. Adj., Sec. 523; Jones on Evidence, Sec. 602; 12 A. & E. Ency. 97; 21 *Ibid.* 177.

The *consensus* of opinion is that the doctrine does not violate the constitutional guaranty of due process of law.

The opinion in this suit cites and relies for its support, among other authorities, upon Lovejoy v. Murray, 3 Wall. 1, and Robbins v. Chicago, 4 Wall. 657.

In those cases this Court announced the doctrine of the Kentucky Court, and did not intimate that it violated the constitutional guaranty of due process of law.

In Lovejoy v. Murray, the sheriff claimed that the judgment against him was conclusive of his right against the principal and sureties in a bond of indemnity given him to procure the seizure of property. This Court, deciding affirmatively, said, 3 Wall. 18:

"The third question is whether the judgment of plaintiff against the sheriff, Hayden, is conclusive against the defendants in this action.

"The facts on which this proposition is based are the giving of the bond of indemnity by the defendants, and that Hayden, when sued, notified them of the suit, and called on them to defend it; that they did employ counsel to defend it, and that the counsel so employed had exclusive control of the defense of said suit.

"The legal facts necessary to enable plaintiff to recover in the present suit are, first, his title to the goods which had been converted; second, the value of those goods; and, third, the participation of the defendants in the conversion. The latter point, we have already seen, is established by the indemnifying bond to the sheriff. Does the record of the judgment against Hayden conclusively establish the other two points, under the circumstances just stated?

"We are of opinion that it does.

"We have already shown that the effect of giving the bond was to make defendants principals in the transaction, and that so far as the action of the sheriff after that was a trespass, it was directed by them, and was for their benefit. With a just appreciation of their relations to each other in the transaction, he called on them, when sued, to assume the defense; and they did so. They were defending their own acts, although the suit was in the sheriff's name. They had full right to make all defense there which they could make here. They could adduce witnesses, and cross-examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf, as rendering a former judgment conclusive in a second suit. 'Justice requires,' he says, 'that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question and between the same parties, should be closed forever. It is also a most obvious principle of justice, that no man

ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound. Under the term 'parties' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings; and to appeal from the judgment. This right involves, also, the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle of which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings.' 'The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded.' 1 Greenleaf Ev., Sections 522, 523. The authorities cited by the learned author fully sustain these propositions.

"The present case comes within them, and must be governed by them. In addition, the following cases have been examined, which affirm the conclusiveness of former judgments, under circumstances which we are unable to distinguish, in principle, from the one before us, and in several instances the analogy in the facts is perfect. Ferrers v. Arden, Cro. Eliz. 668; Kennersley v. Orpe, Dougl. 517; White v. Philbrick, 5 Me. 147; Rapelye v. Prince, 4 Hill, 119; Calkins v. Allerton, 3 Barb. 173; Glass v. Nichols, 35 Me. 328; Castle v. Noyes, 14 N. Y. 329; Warfield v. Davis, 14 B. Mon. 41.

"This last question must, therefore, be answered in the affirmative.

"As the rulings of the Circuit Court were in accordance with the principles here decided, the judgment of that court must be affirmed, with costs."

In Robbins v. Chicago, this court, on the authority of Lovejoy v. Murray, held that Robbins, who had excavated an area in a street, when sued by the city, was bound by the amount adjudged against the city in an action against it for damages for personal injury of one falling into the area.

Robbins was not a party of record in the action against the city; and in adjudging that he was bound by the judgment in that action, this Court said:

"Evidence in the record shows that the defendant knew that the party was injured by falling into the excavation, and that the action against the corporation was commenced; that he was informed of the day of trial, that he was requested to assist in procuring testimony, and that he actually wrote to a witness upon the subject," etc., etc. . . .

"Surely it can not be doubted that the evidence justified the instructions of the Court, and, it might be added, if need be, that it fully warranted the finding of the jury."

It is unnecessary to say that these two authorities fully sustain the doctrine of the Kentucky Court, and preclude argument in this Court.

If a case ever reached a Court illustrating the wisdom of the rule announced by this Court, just invoked, this suit is that case, for to renounce the rule would nullify nearly fourteen years of as fierce and laborious litigation as can be found.

Accordingly, we ask that our motion be sustained.

Respectfully submitted,

EDMUND F. TRABUE,
Counsel for Defendants in Error.

JAMES S. PIRTLE,
Of Counsel.

APPENDIX I.

KENTUCKY COURT OF APPEALS.

ADOLPH SCHMIDT, &c., - - - *Appellants*,

VERSUS

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., &c., - *Appellees*.

Appeal from the Jefferson Circuit Court—Law and Equity Division.

(99 Ky. 143; 18 Ky. L. R. 65.)

(*Filed April* 4, 1896.)

Opinion of the Court delivered by Judge DuRelle:

"The appellant, Schmidt, over ten years ago, as trustee under the mortgage executed by the Northern Division of the Cumberland & Ohio Railroad Company, brought suit against the Louisville, Cincinnati & Lexington Railway Company upon a contract of lease between the Cumberland & Ohio Railroad Co. and the Louisville, Cincinnati & Lexington Railway Co., whereby the former company leased its railroad to the latter for thirty years, and the latter company, in the event that the net earnings of the leased road were insufficient to pay the interest and provide a sinking fund for the payment of the mortgage bonds issued by the Cumberland & Ohio Railroad Company, undertook to supply the deficiency by applying to the purpose so much as might be necessary of the net earnings of its own lines, earned from business coming to it from or over the lines of the Cumberland & Ohio Railroad Co. The facts of the case are fully stated in the opinion of this Court upon the former appeal by Schmidt, Trustee, against Louisville, Cincinnati & Lexington Railway Co., reported in 95th Kentucky, 289, but by some mistake entitled in the Report 'Schmidt, Trustee, v. Louisville & Nashville Railroad Co.' For the facts up to the date of the former appeal, it is unnecessary to do more than refer to that opinion.

"After the reversal of the case on that appeal, an order was duly entered in accordance with the opinion, requiring the Louisville, Cincinnati & Lexington Railway Co. to pay into Court the sum of $53,565.62, with interest, on or before June 11, 1894, and a rule was awarded against the Company to pay in that sum

and interest. To this rule the Company filed a response, stating 'that in 1881 it sold and conveyed for a consideration paid at the time, all its property, rights, privileges and franchises, except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since that time it has had no property, assets or funds of any kind with which to comply with the order of this Court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it.' Another rule was awarded against the company to report the amount of its net earnings on business coming to it from or over the Cumberland & Ohio Railroad since the date of the last net earnings reported by the commissioner's report, which was confirmed in accordance with the opinion of this Court on the former appeal. In response to this rule, the Company said 'that it has not made any net earnings, or earnings of any kind, since the date aforesaid' (the time of the net earnings reported in report 'R. E. S. No. 2') 'on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character, whatever, and has not since the date aforesaid.'

"Motions to strike these responses from the files, and to make them more specific, were overruled. Thereupon the plaintiffs filed a reply to the responses, denying the statements contained in them and averring that the Louisville, Cincinnati & Lexington Railway Co. had never made any legal or other sale of its railroad property, and that the road had been continuously operated in the name of said defendant. Subsequently the plaintiffs asked leave to withdraw the reply to the responses of the Louisville, Cincinnati & Lexington Railway Co., and moved to file an amended and supplemental petition making the Louisville & Nashville Railroad Co. a party defendant.

"The amendment tendered sets out the execution and term of the lease, contract, and mortgage relied on in the previous litigation, avers default in the payment of interest on the bonds in 1886 and subsequently, and charges that net earnings of the Cumberland & Ohio Railroad came into the hands of the Louisville, Cincinnati & Lexington Railway Co. which were not applied to the payment of interest, and that all the sources of the Cumberland & Ohio Railroad for raising money having failed to provide sufficient funds to pay interest on the bonds, it was necessary to appropriate to that purpose the net earnings of the Louisville, Cincinnati & Lexington Railway Co. arising out of business coming to it from or over the lines of the Cumberland & Ohio.

"It further alleges that in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that, by that deed, the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co., the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads of both the Cumberland & Ohio and Louisville, Cincinnati & Lexington Companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincinnati & Lexington Railway Co.; that the Louisville & Nashville Company not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in accordance therewith, until April, 1883, and knew that the earnings referred to were made on the operations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington Companies; that the Louisville & Nashville Company filed an answer herein in the name of the Louisville, Cincinnati & Lexington Company, employed counsel to make defense, and has controlled the defense in this case from the time of service of process. The amendment further avers that, until the responses to the rules herein were filed, the plaintiffs did not know of the control by the Louisville & Nashville Company over the roads of the other two companies, and that it was plaintiffs' intention in bringing this suit to sue the company or companies operating these roads, and which had made the earnings referred to.

"The prayer is, that the Louisville & Nashville Railroad Co. be made a party defendant, for judgment against it; for the subjection of the earnings made on these roads, in accordance with the terms of the lease and mortgage, to the payment of the mortgage debt, and, inasmuch as the Louisville & Nashville Railroad Co. has made the defense in this suit, and, after judgment, has attempted to thwart the collection thereof, that a receiver be appointed to take charge of and operate the properties acquired by the sale, and to apply the earnings according to the judgment of this court.

"The motions to withdraw the reply to the responses, and to

file this amendment, were overruled by the lower court, and from that judgment this appeal has been taken.

"It is earnestly contended by counsel for appellants that the rule laid down in Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638, following and amplifying the doctrine announced in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, applies to this case, and is decisive of it. Appellants claim that the Louisville & Nashville Railroad Co. was the real defendant in this case, made the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and is bound by the judgment.

"This appeal, therefore, presents two questions for decision: first, whether upon the facts alleged in the amended petition and disclosed by the record, the Louisville & Nashville Railroad Co. is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellant's claim.

"Upon the first question there is little difficulty. Assuming the statements of the amended petition to be true (and, for the purposes of this appeal, we must so presume), together with the facts disclosed by the record, it appears that the Louisville, Cincinnati & Lexington company had no railroad, property, or means to conduct a defense; that it had only the franchise to exist, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant in the suit. The record discloses that Mr. R. E. Sewell, who made the report upon which the judgment was based, made affidavit 'that as the Auditor of the Louisville & Nashville Railroad Co., he superintends all work of a similar kind of the Louisville, Cincinnati & Lexington Railway Co., defendant herein, and all like statements rendered herein heretofore by said defendant have been made under his superintendency.' Numerous reports were filed in response to rules taken against the Louisville, Cincinnati & Lexington Railway Co. by the officials who were also officials of the Louisville & Nashville Railroad Co., stating earnings as having accrued to the Louisville, Cincinnati & Lexington Railway Co. from business coming to it from or over the lines of the Cumberland & Ohio.

"In our opinion, the law is well settled that, if the statements of the amendment tendered are true, the Louisville & Nashville

Railroad Co. is bound by the judgment against the Louisville, Cincinnati & Lexington Railway Co.; and in any litigation between the Louisville & Nashville company and the plaintiffs in this suit, the record of this suit might be introduced, with evidence showing the truth of the averments of the amended petition. In the case of Louisville & Nashville Railroad Co. v. Hall, the company was sued by the wrong name, and it was held that, as the company failed to plead further, and failed to disclose its true corporate name, it could not complain that the judgment was rendered against it in the name by which it had been sued. In the case of Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638, a suit was brought against the Louisville, Cincinnati & Lexington Railway Co. for an injury which was inflicted by the Louisville & Nashville Railroad Co. After a period of more than one year from the date of the injury, an amended petition was filed, stating that, by mistake, the defendant was styled the Louisville, Cincinnati & Lexington Railway Co., when it should and was intended to be the Louisville & Nashville Railroad Co., which was the correct name of the defendant sued and intended to be sued in the action, and praying that the defendant be required to defend by its correct name of the Louisville & Nashville Railroad Co., and for judgment against it. In that case the Court held that the Louisville & Nashville Railroad Co. had entered its appearance and made defense to the action within one year from the date of the injury, therefore the statute of limitation could not apply, though, in fact, the only answer filed up to that time was in the name of the Louisville, Cincinnati & Lexington Railway Co. The Court in that case said:

"'In our opinion, not only according to unvarying authority on the subject, but on the principle of estoppel and common fairness, when a part enters his appearance and makes his defense to an action, he can not afterwards complain of the judgment that may be rendered against him, upon the ground that he was sued by the wrong name, or what is practically the same thing, that the name of a different person was inserted in the caption of the petition and in the summons; and it, therefore, necessarily follows that the action must be regarded as commenced and actually pending against him, at least from the time he so enters his appearance, if not from the time he is served with the summons.'

"In the case of Eagle, &c., Company v. Bradley, &c., Company, 50 Fed. Rep. 193, suit was brought for an infringement of a patent, not against the firm which manufactured the articles,

but against a branch of that firm. The firm which manufactured the articles conducted the defense and was defeated, and the decree in that case was held binding upon the firm which conducted the defense. Judge Blodgett, in delivering the opinion, cited Robbins v. Chicago, 4 Wallace, 657; Claflin v. Fletcher, 7 Fed. Rep, 851, and said:

"'The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. . . . Parties in that connection include all who are directly interested in the subject matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit v. Morgan, 7 Wall. 619; Miller v. Liggett, etc., Co., 7 Fed. Rep. 91; Claflin v. Fletcher, *Id.* 851; American Bell Tel. Co. v. National Imp. Tel. Co., 27 Fed. Rep. 666; Morse v. Knapp, 37 Fed. Rep. 352; Lea v. Deakin, 11 Biss. 23, 13 Fed. Rep. 514; Wilson's Ex'rs v. Deen, 121 U. S. 525; 7 Sup. Ct. Rep. 1004.

"'The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case made itself the *dominus litus* in that case; it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found; and may, I think, with entire propriety, be held to be bound, not only upon all questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case. The Hague patent itself was considered by the Iowa court, and not held to be an anticipation or protection as against the complainant's patents. The defendants may, I think, be considered as bound, but all which it could have appropriately put into the record in that case, including the testimony, which it is claimed would carry the Hague invention back of the Wright invention.

"'I am, therefore, of opinion that all the defenses which are urged here have been anticipated and are cut off by the decree in the Iowa case. A decree will, therefore, be entered, finding that the defendant infringed as charged, and for an injunction and accounting.'

"The judgment in that case was affirmed by the Court of Appeals, 7th Circuit, 57 Fed. Rep. 981.

"The Court said:

"'The suit in the Circuit Court of the United States for the Southern District of Iowa was brought to restrain the infringement of the same claims of the same patent here in question. The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant was, in fact, the real party to that litigation, and so far as the decree there is *res adjudicata*, is as effectively concluded thereby as if it were the actual defendant to the record. Lovejoy v. Murray, 3 Wall. 1, 18, 19; Robbins v. Chicago, 4 Wall. 657, 672.'

"In Landes v. Hamilton, 77 Missouri, 565, the Court said:

"'It is not always essential to the creation of an estoppel that the person should be a party to the record, but one who thus instigates and promotes the litigation for his benefit by employing counsel, binding himself for costs and damages, will be bound by the litigation or procedure as much as the party to the record.'

"In Estell v. Peacock, 48 Mich. 471, an action was instituted on a note given plaintiff by defendant for logs. A stranger who had licensed plaintiff to cut the logs, but had undertaken to revoke the license before plaintiff sold the logs and accepted the note, notified the defendant not to pay plaintiff the amount of the note, whereupon defendant permitted the stranger to defend the action in defendant's name. It was held, Judge Cooley delivering the opinion, that the stranger was bound by the judgment, although not a party.

"In Bennett v. Wilmington Star Mining Company, 18 Ill. App. 17, the Court citing Cole v. Favorite, 69 Ill. 457, announced the principle:

"'Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person fall within this category; and in such cases parol evidence is admissible to show who are the real parties in interest, and that they conducted the litigation in the name of other parties.'

"In Valentine v. Mahoney, 37 Cal., plaintiff brought suit in ejectment. Defendant introduced the record of a suit between himself and the tenant of plaintiff's grantor in which the

grantor, being the landlord, defended the suit in the tenant's name. It was held that the landlord, plaintiff's grantor, was bound by the judgment in the suit between the tenant and the present defendant, although not a party, because he conducted the defense, and that the plaintiff took subject to the infirmities of his grantor's title. The Court holding the record admissible, said:

"'Would it not be an anomaly in practice to permit a person after defending an action upon a particular issue, and immediately thereafter to litigate the same matter in another action with the same adversary in total disregard of the judgment in the former action? The judgment is conclusive both upon the landlord and tenant in the subsequent action between them involving the issue of eviction of the tenant by virtue of the judgment.'

"In Stoddart v. Thompson, 31 Iowa, 801, the Court said:

"'One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and doing those things which are usually done by a party, will be bound by the judgment rendered therein.'

"To the same effect see also: Palmer v. Hayes, 112 Ind. 292; Wood v. Ensel, 63 Mo. 193; Strong v. Phœnix Ins. Co., 62 Mo. 289; Cole v. Favorite, 69 Ill. 457; Linton v. Harris, 78 Ga. 265; Lovejoy v. Murray, 3 Wall. 1; Warfield v. Davis, 14 B. M. 41; Freeman on Judgments, Secs. 174-5.

"Upon the second question, whether the procedure adopted is correct, appellee's counsel rely principally upon the cases of Brown v. Vancleave, 86 Ky. 381, and Meadows v. Goff, 90 Ky. 541.

"In the former case the actual question decided was, that after a judgment in favor of the plaintiff, and the receipt by him of the amount of the judgment in satisfaction thereof, his demand was satisfied and his right to appeal barred.

"In the latter case this Court held that, after a final judgment settling a controversy between two litigants, it was too late for a third person to file a petition to be made a party to the suit and set up a claim to the property in controversy.

"Neither of these cases seems to apply directly to the case at bar. But we are of opinion that, after the appeal and judgment in this case, it would be too late to bring into this litiga-

tion one who was neither a party to the Record nor bound by the judgment. In our view, the fact stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for, upon the theory of that amendment, and considering the facts therein stated to be true, that Company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that Company with this litigation, or, to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit stating the facts set out in the amendment.

"Proceedings in this litigation were not ended by the judgment rendered after the last appeal. Undoubtedly the appellant could not only take steps to enforce the satisfaction of the judgment then rendered, but they could proceed to subject net earnings accruing to the Louisville, Cincinnati & Lexington Railway Co. (if that Company had been the real defendant), since the last net earnings reported before the report 'R. E. S. No. 2' was made. So, too, they may, in our judgment, proceed in this litigation to subject those earnings in the hands of the Louisville & Nashville Railroad Co., if it be, as alleged in the amended petition, the real party defendant in this suit. Wiggins Co. v. O. & M. R'y Co., 142 U. S. 292. This question, while not strictly before the Court upon this appeal, has been considered and decided, to the end of preventing needless litigation.

"Wherefore, the judgment is affirmed."

SIMRALL, BODLEY & DOOLAN,
PIRTLE & TRABUE,

For Appellant.

HELM & BRUCE,

For Appellee.

COURT OF APPEALS.

ADOLPH SCHMIDT,

VERSUS

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO.

Court's response to petition for modification.

(*June* 17, 1896.)

"The petition for modification has been carefully considered, and while it is true that the appellee, the Louisville, Cincinnati & Lexington Railway Company, has no interest in the matters in regard to which a modification of the opinion is sought by it, it is, perhaps, also true that the opinion went too far in stating that the questions were *decided* which were not strictly before the Court upon the appeal. It has been the custom of courts, since opinions were written, to state the existence of a remedy which was sought as a reason for denying the remedy which was not sought. In thousands of cases it has been stated that the relief sought in equity was denied because an adequate remedy at law existed. This, however, is universally considered, and properly so, to be stated *arguendo*, and the opinion in this case should have been confined in that respect to stating, as argument, that the Louisville & Nashville Railroad Company was bound by the judgment, if the matters stated in the tendered amended petition were true, and without indicating the exact course of procedure to be adopted.

"To the extent herein indicated, the opinion is modified."

(A copy.)

APPENDIX II.

SCHMIDT, &c., v. LOUISVILLE, CINCINNATI & LEXINGTON R. R. CO., &c.

(19 Ky. Law Rep. 1626; 44 Southwestern R. 130.)

(*Filed January* 14, 1898.)

Opinion of the court by Judge DuRelle:

"This case has been to this court upon three former appeals. It is unnecessary to state the facts in detail in this opinion, as they are fully stated in the opinions reported in 95 Ky. 289, under the style of Schmidt v. Louisville & Nashville R. R. Co., and in Schmidt v. Louisville, Cincinnati & Lexington Ry. Co., 18 Ky. Law Rep. 65. In the former case the amount of net earnings resulting from business coming to the line of the Louisville, Cincinnati & Lexington Ry. Co. from or over the Cumberland & Ohio road was ascertained. In the latter case the question was presented whether an amended petition could be filed making the Louisville & Nashville R. R. Co. a party to the suit after a judgment had been rendered against the Louisville, Cincinnati & Lexington Ry. Co. subjecting to the claim of plaintiffs the net earnings ascertained to have been made from the business before referred to, and in that case it was held that such petition could not be filed, for the reason and upon the ground that, if the Louisville & Nashville R. R. Co. was not a party to the record nor bound by the judgment, it was too late to bring it into the litigation, and if the facts stated in the amended petition tendered were true, that company was already a party defendant and bound by the judgment. Upon the return of the case to the trial court appellants filed an affidavit, stating substantially the same facts which had been stated in the amended petition before tendered; and upon that affidavit, and upon the whole record, asked a rule against the Louisville & Nashville R. R. Co. to pay into the court the amount of net earnings ascertained, and, further, moved to refer the case to a commissioner to ascertain what net earnings had been made subsequent to the report of the commissioner, which was confirmed by the judgment entered in pursuance of the opinion in Schmidt v. Louisville, Cincinnati & Lexington Ry. Co., 18 Ky. Law Rep. 65.

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Ry. Co. from and over the Cumberland & Ohio. If the averments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville, Cincinnati & Lexington Ry., by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit in the name of the Louisville, Cincinnati & Lexington Ry. Co.; and was a real defendant in this action. Assuming these averments to be true the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action.

"After a careful consideration of this question it seems to us that the question whether the Louisville & Nashville R. R. Co. has had its day in court in this suit can be as well determined in this suit as in another. If the Louisville & Nashville R. R. Co. is a party to this suit it is so because it has, as assignee of the contract and owner of the property of the Louisville, Cincinnati & Lexington Ry. Co., obtained the net earnings and conducted the defense of this suit, and the truth of these averments can be ascertained upon rule and response, and the payment of the earnings received be compelled as the production of mortgaged property might be compelled in ordinary proceedings to enforce liens.

"We deem it unnecessary to consider the question whether a personal judgment could have been rendered against the Louisville & Nashville R. R. Co. had it been a nominal defendant upon the averments of the original petition.

"It is sufficient to say, in passing upon the sufficiency of the affidavit, as it would be in passing upon the sufficiency of a petition, that, if the facts stated are true, the Louisville & Nashville R. R. Co. may be compelled to pay over the net earnings which it has received. On the other hand, if the averments of the affidavit are not true, as counsel strenuously insist, the Louisville & Nashville R. R. Co. can not be hurt, for the truth can be made to appear, and if that company is not a real party to the suit it is not bound by the judgment.

"It is sought to distinguish this case from the Heckman case,

85 Ky. 638, and the Hall case, 12 Bush, 131, upon the ground that those cases were suits for torts committed by the Louisville & Nashville R. R. Co., with which no other company was connected. In this suit the complaint is that net profits were not paid over to appellants, but withheld from them. From the affidavit it appears that the Louisville, Cincinnati & Lexington Ry. Co. was not connected with the transaction, but that the Louisville & Nashville R. R. Co., which owned the property of the former company, and was its assignee, was not only connected with the transaction, but actually withheld the net profits and defended the suit in the name of the Louisville, Cincinnati, & Lexington Ry. Co.

"Counsel in the brief say: 'The remaining cases cited by this court in its opinion may be divided up into the following classes:

"'First. Those in which the agent of the real party was sued, and the real party defended the suit in the name of the agent. In each of these cases the right involved was the right of the real defendant. In neither of these cases was the nominal defendant in the slightest interested; his only interest was to defend the right of his principal, and the principal having taken charge of the defense, and that precise question having been litigated, the court held that in a subsequent case the real party was concluded by the finding of the court.

"'Into this class falls the case of Eagle, &c., Co. v. Bradley, &c., Co., 50 Fed. Rep. 193; S. C., 57 Fed. Rep. 981; Wood v. Ensel, 63 Mo. 193; Palmer v. Hays, 112 Ind. 292; Warfield v. Davis, 14 B. M. 41; Clafflin v. Fletcher, 7 Fed. Rep. 851.'

"It seems to us that the analogy is well nigh perfect between the case of a principal defending in the name of his agent a suit in which relief was sought against the agent, and the case of an assignee defending in the name of his assignor a suit in which relief is sought against the assignor. In each case the real and only party in interest, the party by whose procurement and for whose benefit the wrong was committed, is not a party to the record. In the one case the real party is held bound by the judgment. Why not in the other? Indeed the averments of the affidavit come very close to making out a case of agency.

"Much stress is laid upon the case of Allin v. Hall, 1 Marshall, 525, as holding that only parties to a suit or their privies are barred by the judgment therein. While under the facts of that case it may well be doubted if the same conclusion would be reached to-day, in the light of the later doctrine, no one disputes the correctness of the general rule there stated. On the other hand, we do not understand counsel to dispute the modern doctrine that persons may be bound by a judgment who are neither

parties of record nor their privies. The question here is whether the Louisville & Nashville R. R. Co. is a real party.

"Many other questions are raised in the brief which were raised and considered upon the former hearings, and are, therefore, not referred to here.

"Judgment reversed and cause remanded for further proceedings in accordance with this opinion."

No. 1178.

Brief of Simrall for M. & O. R.R. Co.

FILED
APR 1 1899
JAMES H. McKENNEY

Filed April 1, 1899.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

THE LOUISVILLE & NASHVILLE R. R. COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, in his own behalf and as Trustee of the Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

JOHN G. SIMRALL,
For Defendants in Error.

EDMUND F. TRABUE,
TEMPLE BODLEY,
JOHN C. DOOLAN,
BENJAMIN F. WASHER,
Of Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

NOTICE OF MOTION TO DISMISS OR AFFIRM.

Plaintiff in error, the Louisville & Nashville Railroad Company and its counsel, James P. Helm and Helm Bruce, will take notice that on Monday, the 3d day of April, A. D. 1899, at the court room of the Supreme Court of the United States, in the city of Washington, D. C., at or about the hour of twelve o'clock M., at motion hour of the court, the defendants in error will move the said court to dismiss the writ of error in the above entitled cause for want of jurisdiction in the court, and will, also, move said court to affirm the judgment to which said writ of error purports to have been prosecuted on the ground that it is manifest that the said writ of error was taken for delay only; and manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument; as is fully set out in the

motion and the briefs of John G. Simrall and Edmund F. Trabue, counsel for defendants in error, copies of which are delivered with this notice.

JOHN G. SIMRALL,
EDMUND F. TRABUE,
Counsel for Defendants in Error.

As counsel for plaintiff in error, I acknowledge service of the within notice, and receipt of copy of the motion referred to, and copies of the briefs of John G. Simrall and Edmund F. Trabue, counsel for defendants in error, this, the Eleventh day of March, A. D. 1899.

JAMES P. HELM,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

MOTION TO DISMISS OR AFFIRM.

Come now the defendants in error by their counsel appearing in their behalf, and move the Court to dismiss the appeal in the above entitled cause, for want of jurisdiction in the Court; because,

The judgment and decree from which the said writ of error purports to have been prosecuted is a judgment and decree of the Court of Appeals of one of the United States, to wit, the Court of Appeals of the State of Kentucky, and said judgment and decree is not founded or based upon a Federal question, and does not involve the constitutional provision requiring "due process of law," or any Federal question.

Said judgment of the Court of Appeals of Kentucky involves a question of State procedure, which has been decided by the State Court according to its settled practice, and after a form

supplying notice and hearing, and does not, in any aspect, present a Constitutional or Federal question.

Said judgment of the Court of Appeals of Kentucky is based upon the findings of facts, as follows:

That the plaintiff in error in the protection of an interest which it had in the litigation defended the action of Schmidt, Trustee, v. The Louisville, Cincinnati & Lexington Railway Company, by filing the pleadings in the case, by adducing and cross-examining all the witnesses in behalf of the defense to the action, by prosecuting the several appeals in the case to the Kentucky Court of Appeals. On these conclusions of fact the State court held, under and by virtue of the general principles of estoppel and policy, that the plaintiff in error was bound by the judgment rendered in the action of Schmidt, Trustee, v. The Louisville, Cincinnati & Lexington Railway. This decision of the State court did not involve the constitutional guarantee of "due process of law" or any Federal question.

Said judgment of the Court of Appeals of Kentucky was further based upon the finding of the State court that the proceeding in which it was rendered was a proceeding *in rem*, and that the plaintiff in error, having full notice of the action, was bound by the judgment affecting the *res* in controversy. Said decision is not in conflict with the Constitution of the United States and does not involve a Federal question.

Plaintiff in error in the State court did not attempt to raise a Federal question until long after the decision of the State court of which it complains, to wit, March 21, 1898, the decision having been rendered April 4, 1896, and a Federal question, if any arose, was suggested too late and was waived.

Defendants in error by counsel, as aforesaid, also move the Court to affirm the said judgment to which said writ of error purports to have been prosecuted, because,

Although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said question upon which the said writ of error is based is so frivolous

as not to need further argument; said question having been decided by the State Court in conformity with the rulings of this Court and the repeated decisions of the Courts of last resort of almost every State of the Union.

Accordingly it is manifest that the writ of error was taken for delay only.

JOHN G. SIMRALL,
EDMUND F. TRABUE,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR, ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

This case is before the court on motion under Rule 6, to dismiss for want of jurisdiction, or affirm. The claim of jurisdiction is based upon the contention that the judgment of the Circuit Court affirmed by the Court of Appeals of Kentucky, deprives plaintiff in error of its property without due process of law. (Rec. 323.)

The judgment assailed was entered April 2, 1898, and required said plaintiff to pay into Court $77,784.45; and was affirmed by the Court of Appeals as a "delay case," October 28, 1898. (Rec. pp. 308 and 317.)

This judgment represented the net earnings of the Louisville, Cincinnatti & Lexington Division of the railway system of plaintiff in error, made on the traffic supplied to it by the North-

ern Division of the Cumberland & Ohio Railroad (hereinafter called C. & O.). The earnings were, by said judgment, subjected to a lien created thereon by a mortgage executed July 2, 1879, by the Louisville, Cincinnati & Lexington Railway Company, former owner of said division of said railway system (Rec. 14); and this suit was instituted October 12, 1885, by the trustee in said mortgage to enforce a lien on said earnings.

The facts are stated so accurately by the Court of Appeals of Kentucky in their first opinion in this case (95 Kentucky, page 291), made part of this record by agreement, that we copy therefrom:

"In 1879 the Northern Division of the Cumberland & Ohio Railroad Company leased to the appellee, the Louisville, Cincinnati & Lexington Railway Company, for the term of thirty years, its unfinished road-bed, rights of way, with improvements and appurtenances, depots and depot grounds, machinery, tools, and implements, together with all its property, rights, and franchises, belonging to or in any way appertaining to its line of railway at the town of Eminence, Ky., thence running southwardly through the counties of Henry, Shelby, and Spencer, and terminating in the county of Nelson.

"In this lease, the first-named company agreed to mortgage to the appellee all its property, rights, and franchises belonging to or in any way appertaining to its line of railway as described above, to secure the payment of three hundred and fifty bonds of one thousand dollars each, with coupons attached, to run for a term of years. The number of these bonds was subsequently reduced to two hundred and fifty. These bonds were to be put in the hands of the appellee to be sold, and the proceeds applied to the construction of the Cumberland & Ohio Railroad, and if there were any deficiency to complete the road from Shelbyville to Bloomfield, the appellee was to supply it and have a second lien therefor on the road. After such construction, the appellee was to operate the road under the lease for thirty years, and apply the net earnings derived therefrom to the payment of interest on the bonds indicated, and to the creation of a sinking fund for their retirement. To this end, the lessee was to make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping the road-bed in order. Out of the gross earnings was first to be deducted annually the sum of one thousand dollars to be paid to the lessor

with which to keep up its organization; and, if the net earnings did not prove sufficient to pay the interest and provide for the sinking fund on the mortgage bonds, then the lessee (appellee)—if other sources of raising money failed the lessor—was to supply the deficiency as far as might be done by appropriating the net earnings, or so much as might be needed on its own lines, which might accrue by reason of business coming to it from or over the lessor's lines. The construction of the road from Shelbyville to Eminence was abandoned because the appellee had obtained a long lease of the Shelby Branch Road, which connected with its own lines at Anchorage, thus connecting the contemplated road of the lessor with its own road, and making it a "feeder" therefor. The sale of these bonds depended on the plan adopted for the prompt payment of the interest, and in order that this might be met promptly, the appellee agreed to pay it during the construction of the road, and then, as we have seen, see to its payment out of the earnings indicated. The appellee at the start contemplated giving an absolute guaranty of the payment of this interest, but upon the advice of its attorney that it had no power to do so, it executed the following mortgage on the earnings pledged in the lease heretofore described:

"'That, whereas, by authority of an act of the General Assembly of the Commonwealth of Kentucky, approved the 18th day of March, 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio Railroad Company for the lease, construction, and operation of the latter company's line of road from Eminence, in Henry County, Ky., through a part of said county, and the counties of Shelby and Spencer, and into Nelson County, so far as Bloomfield, all in the State of Kentucky; said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein, that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of three hundred and fifty bonds of one thousand dollars each, bearing interest at the rate of seven per cent per annum, payable half yearly on the first days of June and December, and having twenty years to run from the second day of July, 1879, to be issued by said Northern Division of the Cumberland & Ohio Railroad Company; and if all the sources of raising money of said Northern Division of the Cumberland & Ohio Railroad fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed on its own lines, which may accrue to it by reason of business coming to it

from or over the said lines of the said Cumberland & Ohio Railroad Company, and whereas said contract of lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulation as to said net earnings.

"'Now, in consideration of one dollar cash in hand paid by said second party to said first party, and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio Railroad Company to the said Joshua F. Speed as trustee aforesaid (who is the trustee for the mortgage made by said Northern Division of the Cumberland & Ohio Railroad Company to secure said three hundred and fifty bonds, of one thousand dollars each), conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company prove insufficient, will supply the deficiency so far as it may be done by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines for the purpose of discharging said interest and sinking fund as they severally fall due.'

"In pursuance of the contract of the lease and mortgages, these bonds were placed on the market by the appellee and sold at about their face value. No interest having been paid on them since 1883, the appellant, Schmidt, as successor to the trustee named in the mortgage, and the other appellants who were purchasers of the bonds, instituted this action to compel the appellee to account for the net earnings alleged to have accrued to it by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines for the purpose of paying the defaulted interest and establishing the promised sinking fund with which to retire the principal at maturity. The appellee denied that it has made any profit from the business coming to it from or over the lines of the leased road.

"The case was elaborately prepared, and after a number of references to, and reports from, special commissioners—experts in the tabulation of figures—and the accumulation of several thousand pages of record, the chancellor finally dismissed the petition."

The principal point in that appeal was the second question as stated by the Court, page 297 (95 Ky. 297):

"The second question is how are we to ascertain the net earnings in lien under the mortgage?"

The judgment of the court below dismissing our petition was reversed by the Court of Appeals, which ordered the confirmation of the report, R. E. S. No. 2 in this Record, page 65, showing net earnings of $60,192.27 to which the Cumberland & Ohio bondholders were entitled under said mortgage up to 1890, the date of that report.

That report was the basis of the judgment herein from which the last appeal was taken.

Upon the confirmation of that report in the lower court, a rule was taken upon the Louisville, Cincinnati & Lexington Railway to pay those earnings into Court, as covered by the mortgage (Record, page 214), and a further rule to report the net earnings accrued since the last report was made.

To the first rule the Louisville, Cincinnati & Lexington Railway made the following response (Record, page 215):

"The Louisville, Cincinnati & Lexington Railway Company, for response to the rule herein issued against it to show cause why it shall not pay into court the amount of $53,565.62, says that in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges, and franchises, except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets, or funds of any kind with which to comply with the order of this Court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it.

"HELM & BRUCE,
"Attorneys for Defendant.

"The affiant, J. H. Ellis, states that he is the secretary of the defendant, The Louisville, Cincinnati & Lexington Railway Company, and is the chief officer of said Company now in the

State of Kentucky, and that he believes the statements of the foregoing response to be true.

"J. H. ELLIS.

"Subscribed and sworn to by J. H. Ellis, June 11, 1894.

"THOS. B. HARRISON,

"Notary."

To the second rule the said Louisville, Cincinnati & Lexington Railway made this response (Record, page 217):

"The defendant, the Louisville, Cincinnati & Lexington Railway Company, responds to the rule against it to show cause, if any it has or can, why it should not be compelled to report herein the amount of its net earnings on business coming to it from or over the Cumberland & Ohio road since the time of the last net earnings reported in said report, R. E. S. No. 2, together with the interest thereon from the time said earnings should have been applied, under the contract, in payment of the interest on the bonds—states and shows to this Court that it has not made any net earnings or earnings of any kind since the date aforesaid, on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid.

"HELM & BRUCE,

"Attorneys for Defendant.

"M. H. Smith says he is the president of the defendant, and that he believes the statements contained in the foregoing response are true.

"M. H. SMITH.

"Subscribed and sworn to before me by M. H. Smith this 28th day of June, 1894.

"THOS. B. HARRISON, JR.,

"Notary Public, Jefferson Co., Ky.

"My Commission expires July 10, 1896."

Milton Smith, the President of the L. C. & L. Railway, and also of the Louisville & Nashville Railroad, had given his deposition in this action in 1891 (Record, page 184), and had testified that the Louisville & Nashville Railroad Co. owned the stock of the Louisville, Cincinnati & Lexington Railway Co.

On page 189 he says:

"*Q.* Does the Louisville & Nashville Railroad own any of the bonds executed by the C. & O. Northern Division?

"*A.* The Louisville & Nashville Railroad Co. as the owner of the stock of the L. C. & L Railway Co. and thereby responsible for the payment of the bond obligations of the Company is the owner of fifty bonds of the C. & O. Northern Division, said bonds having been placed in the sinking fund under the mortgages."

These responses made such disclosures as led to the truth that the Louisville & Nashville Railroad Co. had taken an assignment of the lease of the Cumberland & Ohio road and had bought bodily the Louisville, Cincinnati & Lexington Railway, and had been operating both roads and been receiving all the earnings pledged to these C. & O. bondholders both under the lease and mortgage during the entire time of this litigation, then ten years, and now about fourteen years.

It thus developed that the *Louisville & Nashville Railroad Co.* had been the *real defendant* to this suit all the time; for these responses disclose the fact that the *nominal defendant* had no railroad, had operated none, had received no earnings, had no assets; did not have a nickel with which to defray the expense of this litigation; in fact, had no interest in it; but had sold out "lock, stock, and barrel" to the Louisville & Nashville Railroad Co. before this suit was brought.

The summons in this action was served upon Milton Smith, the President of both railroad companies (see pages 14 and 184).

As said by the Court of Appeals of Kentucky in the Heckman case, 85 Ky. 631, where the Louisville & Nashville Railroad offered the same contentions as here, it was the duty of the defendant, if it was acting in good faith with the Court, to have disclosed these facts at the threshold.

But such was not the intention. The Louisville and Nashville Railroad Co. was operating both roads, and receiving day by day all the earnings pledged to these bondholders, which are

the subject-matter of this litigation; and its intention was as shown by the Record to defend this suit—with all its wealth and power, in the name of a nominal defendant; until it had worn out the bondholders with litigation, and then if a judgment should be rendered, to plead that it had never been a party to the suit and had never had a day in Court.

And this is precisely what the Louisville & Nashville Railroad Co. has done. After a long and costly litigation resulting in a final judgment, it asks to be permitted to take advantage of its own wrong and to fight it all over again in its own name.

And when we say "*fight it over*," we mean "*fight it over.*" For there has already beed a *battle royal* all along the line in this action, for fourteen years. This Record shows that the Louisville Law and Equity Court decided so many times in favor of the Louisville & Nashville Railroad Co. that we were compelled to go to the Court of Appeals of Kentucky five times to secure the rights of these bondholders.

And still the L. & N. is not content; but comes to the Supreme Court of the United States—after having exhausted in the State Court all the means known and unknown to the law to defeat an honest debt—with the pitiful plea, that it has not yet had *a day in Court.* With it *one day* must be as a *thousand years.*

The Record before this Court is but a fragment of the enormous Record made by this stubborn litigation.

In the first opinion of the Court of Appeals, 95 Ky., page 295, that Court says:

"The case was elaborately prepared, and after a number of references to and reports from special Commissioners—experts in the tabulation of figures—and the accumulation of *several thousand pages of Record*, the chancellor finally dismissed the petition."

On pages 317, 318, and 319 of the Record is an agreement of counsel, showing parts of Record omitted. On page 319 is statement of contents of one report alone of 5,000 pages. It says:

"The report of Calvert covers about 5,000 pages and occupied about ten months in making same, with the aid of another deputy, for which he charged $4,000.00.

"Calvert was selected as Special Commissioner as a railroad expert. His report was a statement of the gross earnings derived by the defendant in the action on business coming to it from or over the Northern Division of the Cumberland & Ohio Railroad under the lease, contract, and mortgage between the said parties, and of the expense incurred in handling the business, with various theories and statement showing what proportion of the expense of the whole *Louisville & Nashville Railroad System* should be deducted from its gross earnings to which the plaintiffs, the Cumberland & Ohio bondholders, were entitled under their mortgage and lease."

In this Record, pages 60 to 171 inclusive, there are *ten different reports*, making about 111 pages of figures compiled by R. E. Sewell as Special Commissioner, but at the same time he was the *Auditor of the Louisville & Nashville Railroad Co.*

He says on page 76:

"The affiant, R. E. Sewell, says that as the *Auditor* of the *Louisville & Nashville Railroad Company* he superintended all work of a similar kind of the Louisville, Cincinnati & Lexington Railway Co., defendant herein; and all like statements rendered herein heretofore by said defendant, have been made *under his superintendence.*"

The Court will see what an enormous labor this was, performed in this action by one of the chief officers of the *Louisville & Nashville Railroad Co.* and without a cent of charge therefor. In making these reports the defendant took the depositions of three other principal officers of the Louisville & Nashville Railroad Co., viz.: Charles Haydon, Assistant Comptroller; Edward Rowland, Auditor of Receipts, and Milton Smith, President.

On page 174 Haydon testified as follows:

"Charles Haydon being duly sworn and examined by Mr. Helm as attorney for the defendant, deposed as follows:

"1. Will you please state your name, age, residence, and occupation?

"*A.* Charles Haydon, 53 years old, reside in this city, Assistant Comptroller of the L. & N. Railroad.

"2. I show you now an account kept between the Northern Division of the Cumberland & Ohio Road and *the Louisville & Nashville Railroad, running back,* however, to a period when the account was kept between the old Louisville, Cincinnati & Lexington Railroad and the Northern Division of the Cumberland & Ohio, and ask you whether this report was taken from the Records of the *Louisville & Nashville Railroad* office under your supervision, and whether you know it to be correct?

"*A.* Yes, sir; this account was made out in my office and was taken from the books.

"3. Is it a correct transcript?

"*A.* Yes, sir; it is an accurate transcript from the Book."

Edward Rowland (page 174) testifies that he was the "Auditor of Receipts of the Louisville & Nashville Railroad:"

14. "Were the statements showing the number of tons of freight carried over the L. C. & L. Railway and the Shelby Railroad, and the number of tons of freight carried one mile over said Roads, and the Revenue on said freight accruing from said Roads, all of which freight came from or went to the Northern Division of the Cumberland & Ohio Road, compiled in your office and under your supervision?

A. "Yes, sir."

Then comes the deposition of Mr. Milton Smith, page 184. In answer to the first question he says he is the President of the Louisville & Nashville Railroad Co.

His entire deposition is then an elaborate review of the Report R. E. S. No. 2, made by his own Auditor Sewell—which is the basis of the judgment in this action.

On page 186 this question is asked him:

Q. "Have you examined Special Commissioner R. E. Sewell's Report, especially that phase of it known as No. 2? If so, please state whether in your opinion it proceeds upon a correct principle, and whether or not it is correct in details? Answer this question fully."

He then proceeds at great length to show wherein this Report of his own Auditor is erroneous. And on page 189 he says:

"*A.* The contracts between the L. C. & L. Railway and the C. & O. Northern Division have resulted in very great losses to the *Louisville & Nashville Railroad Co.* The gross earnings of the C. & O. Northern Division have never been sufficient to pay operating expenses. On the contrary, the deficit has been very large. The total loss growing out of the contracts between the L. C. & L. Railway and the C. & O. Northern Division up to June 30, 1890, amounts to $522,103.38, not including loss upon depreciation in the value of the fifty Bonds owned, resulting from the failure of the property to earn an amount in excess of the operating expenses sufficient to pay the interest upon the said bonds. The operating expenses to June 30, 1890, were $309,027.27, and the gross earnings $185,407.49; operating expenses in excess of gross earnings, $123,619.88."

Now the curious thing is to explain this deposition in connection with the two responses filed by the defendant herein on pages 215 and 217.

One of these responses is sworn to by Milton Smith, the President of both the L. C. & L. and the L. & N. Railroads; and both responses show that the L. C. & L., the nominal defendant, has never operated any railroad during all this time, and has never received one cent of earnings.

What, then, does this deposition of Milton Smith relate to?

Of course, the earnings received by the *Louisville & Nashville Railroad Co.* on what was known as the L. C. & L. Railway Co. on its own lines on business coming to it from or over the Cumberland & Ohio Railroad (Northern Division).

During this entire deposition the Court will find that Milton Smith, the President of both the L. C. & L. and the L. & N. Railroads speaks of both of them as one and the same, so far as these transactions are concerned.

Then, again, this litigation had been conducted entirely by Barnett, Miller & Barnett as attorneys for the defendant for six years up to the 20th of April, 1891, when, for some reason, which the record does not disclose, they retired from the cause and Helm & Bruce were substituted in their stead. When they retired, they did so as *the attorneys of the Louisville & Nashville*

Railroad Co., showing that up to that time the action had been defended by the *Louisville & Nashville Railroad Co.* This is shown by the following extract from the Record (pages 79 and 80):

"At a Court held for the Court aforesaid on the 20th day of April, 1891, came Barnett, Miller & Barnett, and filed a written notice in this action duly accepted. And on their motion their names are stricken from the Record herein *as attorneys for Louisville & Nashville Railroad Co.*

"Said notice is in words and figures as follows, to wit:

LOUISVILLE LAW AND EQUITY COURT.

SCHMIDT, - - - - - - - - - *Plaintiff*,
VERSUS No. 1860.
L. C. & L. R'Y CO., - - - - - *Defendant*. } Notice.

"*The Louisville & Nashville Railroad Company* will take notice that on Monday, April 20th, 1891, at the motion hour we will move the Court to strike our names from the record herein as attorneys for said Railroad Company.

"BARNETT, MILLER & BARNETT."

"Notice accepted."

HELM & BRUCE, *Att'ys for Def't.*"

(See Order, page 79.)

It was within sixty days from the disappearance in this case of Barnett, Miller & Barnett as *the attorneys of the Louisville & Nashville Railroad Company*—never pretending to represent anybody else—when Messrs. Helm & Bruce, having taken their place, commence the taking of proof; and prove beyond the shadow of a doubt on page 174, by the deposition of Haydon, Assistant Comptroller of the L. & N., that the entire controversy in this case is with the *Louisville & Nashville Railroad Co.*

In fact, Mr. Helm, the attorney for the L. & N., in the second question he puts to the witness, assumes that the controversy is with the *Louisville & Nashville Railroad Co.* (P. 174.)

When these responses were filed showing that the nominal defendant, the L. C. & L. Railway, had no railroad, had operated

none, and had received no earnings, and had no interest in this litigation and no money to defray the expense thereof; this record then became luminous with the overwhelming proof that the *Louisville & Nashville Railroad Company* had been the *real defendant* all the time.

We then tendered an amended petition (page 224 of the Record), setting up the facts hereinbefore stated, and making the Louisville & Nashville Railroad nominally a party, and showing that the L. C. & L. had no railroad, property, or means to conduct a defense, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant, and made the entire defense.

We then made the following additional allegations, in substance, as set out in the opinion of the Court of Appeals of Kentucky (99 Kentucky, 147–149–150–155, Appendix to brief of associate counsel):

"It further alleges that in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road, and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that by that deed the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co., the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads of both the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincinnati & Lexington Railway Co.; that the Louisville & Nashville Co. not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in accordance therewith until

April, 1883, and knew that the earnings referred to were made on the operations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; that the Louisville & Nashville Co. filed an answer herein in the name of Louisville, Cincinnati & Lexington Co., employed counsel to make defense, and has controlled the defense in this case from the time of service of process. . . .

"Upon the first question there is little difficulty. Assuming the statements of the amended petition to be true (and for the purposes of this appeal we must so presume), together with the facts disclosed by the record, it appears that the Louisville, Cincinnati & Lexington Co. had no railroad, property, or means to conduct a defense; that it had only the franchise to exist, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant in the suit. . . .

"In our opinion the law is well settled that if the statements of the amendment tendered are true the Louisville & Nashville Railroad Co. is bound by the judgment against the Louisville, Cincinnati & Lexington Railway Co., and in any litigation between the Louisville & Nashville Co. and the plaintiffs in this suit the record of this suit might be introduced, with evidence showing the truth of the averments of the amended petition. . . .

"In our view the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for upon the theory of that amendment, and considering the facts therein stated to be true, that company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co. setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment."

The lower court refused to allow this amendment to be filed, on the ground that there was no privity between the Lonisville & Nashville Railroad and the other parties to this contract, and that our mortgage on earnings only applied to such as were made by the L. C. & L. Railway Co., and that when the L. C. & L. sold out to the L. & N. our lien was gone.

The Court of Appeals (99 Ky. 143) affirmed the judgment so far as it did not allow the amendment to be filed, but put it upon the ground that it was not necessary to bring the Louisville & Nashville Road before the court by an amendment—that if the facts set up in the amended pleading tendered were true, the Louisville & Nashville Railroad had been the real defendant all the time.

Upon the return of the case to the Lower Court in pursuance of that opinion, we filed the affidavit of plaintiff, A. L. Schmidt, Trustee, setting up substantially the foregoing facts as contained in the Amended Petition (page 262 of Record), and asked a rule against the Louisville & Nashville Railroad Co. to pay into Court the net earnings covered by the mortgage and lease as found in the Report R. E. S. No. 2, which had been confirmed.

The Lower Court still refused to grant the rule. We then appealed again to the Court of Appeals, which reversed the Lower Court again (44 S. W. Rep. 130), and gave the Louisville & Nashville Railroad Co. an opportunity to show in response to the rule whether or not it had been the real defendant herein. Upon this mandate the Lower Court finally granted the rule, and the Louisville & Nashville Railroad responded.

On the hearing, the foregoing affidavit and the entire record were read. The response was adjudged insufficient; the rule made absolute. Another appeal taken; the judgment affirmed by the Court of Appeals. (47 S. W. Rep. 583; 20 Ky. L. Rep. 810.)

Then the writ of error; and the case is brought to this Court.

The response made by the Louisville & Nashville Railroad (page 293) wholly fails to deny that it was the *real defendant* to this suit.

It does not deny that it filed an answer herein in the name of the Louisville, Cincinnati & Lexington Railway Co. It does not deny that through its attorneys and President and other officers it has taken the depositions, kept the accounts, and made the reports herein and managed the entire defense herein from the date of the service of process.

It in effect admits all these things and the further fact, that it has been operating the road all this time and received all the earnings which are the subject matter of this litigation, and now has them in possession.

The response to the rule makes two defenses:

First, the technical defense that the L. & N. was not nominally a party to the suit, and, for the first time, sought to raise a Federal question.

Second, a defense to the merits, to wit: That the contract sued on was made with the L. C. & L. Railway, and that the lease was assigned to the Louisville & Nashville Railroad in violation of the lessor's charter.

But this last-named question had been fully settled in another suit between these same parties, including the L. & N. in a suit in the Shelby Circuit, which has been going on for years concurrently with this. (41 S. W. Rep. 1015.)

When the Louisville & Nashville Road found out that in this action the courts would compel it to comply with this contract made with the L. C. & L. Railway, it gave notice that it would abandon the Cumberland & Ohio Road and cease to operate it under that lease.

A. L. Schmidt, Trustee for the Cumberland & Ohio Bondholders, then filed a Bill in Equity in the Shelby Circuit Court for a mandatory injunction against the Louisville & Nashville Railroad Co., compelling it to continue to operate said C. & O. Road under said lease; which was granted on final hearing in the Court of Appeals of Kentucky.

The opinion of the Court of Appeals in that case considers thoroughly the rights and obligations of the Louisville & Nashville Railroad Co. under these contracts, and holds that the lease and mortgages are to be considered as one contract, and that, by reason of the facts—that the Louisville & Nashville Railroad Co. had bought one of these roads and taken an assignment of the lease on the other, and had gone into possession and was operating both of them—the Louisville & Nashville Railroad Co.

had thereby stepped into the shoes of the Louisville, Cincinnati & Lexington Railway Co., and had assumed its obligations, and was bound by both the mortgage and the lease. See opinion of Court of Appeals, 19th Law Reporter, page 666; 41 S. W. Rep. 1015.

By order on pages 296 and 297, the said opinion and affidavits showing these facts were also read on the hearing of this response of the L. & N., which was adjudged insufficient.

This would seem to be *res adjudicata* as to the L. & N. on a defense to the merits made by the L. & N. in its own name, in this case.

We have endeavored to state the facts of this case concisely, but fully, so as to enable the Court, without further examination of the record, to promptly dispose of our motions, which are:

First: To dismiss this writ of error for want of jurisdiction.

Second: To affirm as a delay case.

ARGUMENT.

The Question of Procedure.

For nearly four years the question was litigated in the State Courts as to whether or not the Louisville & Nashville Railroad Company was before the Court as the real defendant; and after being before the Court of Appeals of Kentucky on that question alone three times, it was finally conclusively settled that the *Louisville & Nashville Railroad Co.* was the real defendant and concluded by the judgment.

The Court of Appeals of Kentucky, in deciding this question, says (Ky. Law Rep. 19, page 1626; 44 S. W. Rep. 30, Appendix to brief of associate counsel):

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Ry. Co. from and over the Cumberland & Ohio. If the aver-

ments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville, Cincinnati & Lexington Ry., by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit in the name of the Louisville, Cincinnati & Lexington Ry. Co.; and was a real defendant in this action. Assuming these averments to be true, the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action.

"After a careful consideration of the question, it seems to us that the question whether the Louisville & Nashville Railroad Company has had its day in court in this suit can be as well determined in this suit as in another. If the Louisville & Nashville Railroad Company is a party to this suit it is because it has, as assignee of the contract and owner of the property of the Louisville, Cincinnati & Lexington Railway Company, obtained the net earnings and conducted the defense of this suit, and the truth of these averments can be ascertained upon rule and response, and the payment of the earnings received be compelled as the production of mortgaged property might be compelled in ordinary proceedings to enforce liens."

On the return of the case to the lower court the Trustee for the bondholders filed his affidavit (Rec., p. 262) and secured a rule against the L. & N. to pay into Court the fund theretofore adjudged as belonging to said bondholders. To this rule the L. & N. filed a response, which was held insufficient. The procedure was regular and not reviewable.

The case of Iowa Central Railway Co. v. Iowa, decided at October term, 1895 (160 U. S., page 392), was an application for a mandamus to compel the Railroad Company to operate a leased road.

This Court, in an opinion by Mr. Justice White (160 U. S., page 392), said:

"It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would

be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words."

The Court dismissed the writ of error for want of jurisdiction.

The opinion of this Court in the foregoing case seems to decide so clearly that the question raised here is one of procedure, and conclusively settled by the State Court, and that the Federal Courts have no jurisdiction to review it, that we hardly feel justified in further argument.

The Kentucky Court of Appeals decided that the question of whether the Louisville & Nashville Railroad had been the real party defendant to the suit of Schmidt, Trustee, v. Louisville, Cincinnati & Lexington Railway might be and was determined by proceeding by rule and response. Such a course gave the L. & N. reasonable notice of the objects sought to be attained and afforded fair opportunity for the L. & N. to be heard on any issue which its position permitted it to raise.

These facts appearing from a reading of the record and the opinion of the State Appellate Court, the utterance of this Court in Iowa Central R. Co. v. Iowa, *supra*, would place a review of the question of procedure beyond the province of this submission.

The Merits of the Submission.

The regularity of the proceedings by which the Louisville & Nashville Railroad was held bound by the judgment rendered

against the Louisville, Cincinnati & Lexington being placed beyond the scope of this review, we come now to consider the merit of the writ. As will be seen from a perusal of the affidavit filed in support of the rule and the response thereto, and the opinion of the Kentucky Court of Appeals, this case was decided by the State Court on the two grounds:

First. This was a proceeding *in rem*, and the Louisville & Nashville, having notice of the proceedings, was bound by the judgment affecting the *res* (19 Ky. Law Rep. 1626).

Second. The Louisville & Nashville, having an interest in the litigation, having received the net earnings referred to in the pleadings and proof, having defended the suit in the name of the Louisville, Cincinnati & Lexington, was the real defendant in the action, and was bound by the judgment (19 Ky. Law Rep. 1626).

We now submit:

(1) That both phases of the case are sustained by the facts of the record, and are amply sufficient in law to support the findings of the State Court, and therefore there can be no lack of "due process of law."

(2) That it is without the jurisdiction of this court to review the questions presented, as the two basic propositions of law announced by the Kentucky Court of Appeals are of that general nature upon which the State Court is at liberty to decide as seems to it right and proper.

We observe this order of discussion because a consideration of the first contention will place the court in possession of facts and authorities calculated to illumine and support the second chapter of our argument. This program perhaps reverses the natural order of things, but we deem it best adapted to an intelligent review of the case.

This Action Was a Proceeding in Rem.

Under the lease and mortgage between the Louisville, Cincinnati & Lexington Railway (hereinafter called the L. C. &

L.) and the bondholders of the Northern Division of the Cumberland & Ohio Railroad (hereinafter termed C. & O.), the latter had a lien on all the net earnings coming to the L. C. & L. from and over the C. & O. Before these earnings accrued, to wit, in 1881, the L. C. & C. conveyed the lease and mortgage to the L. & N., who thereby assumed the obligations of these deeds, and became bound for their performance. In 1885 net earnings of the L. C. & L. coming to it from and over the C. & O. came into existence, and not being appropriated as required by the terms of the instruments above mentioned, the bondholders of the C. & O. instituted suit for the purpose of enforcing their mortgage upon such earnings. There was nothing more asked or contemplated by the suit than an enforcement of a lien upon property. No personal judgment was sought; no relief prayed, save an adjudication as to the ownership of these earnings. The petition recites the various contracts and agreements existing between the L. C. & L. and the bondholders of the C. & O., the existence of earnings properly belonging to the bondholders, and concludes with the following prayer: (Record, page 13.)

"Wherefore the plaintiffs pray that this action be referred to the commissioner of this Court, with directions to take proof concerning and report the net earnings aforesaid of the Northern Division of the Cumberland & Ohio Railroad Company, and on the lines of the Louisville, Cincinnati & Lexington Railway Company, which may be liable and subjected by the order herein to pay the accrued interest and coupons attached to said bonds; that said Louisville, Cincinnati & Lexington Railway Company be required by order herein to pay all such earnings into court, and that the same be applied to the payment of said interest and coupons, for plaintiffs' cost, etc."

The answer filed in the name of the L. C. & L. is simply a denial that the earnings mentioned in the petition had ever accrued; a mere traverse of the allegation concerning the existence of the property sought to be recovered by the petition.

The rule against the L. & N. does not ask a personal decree

against the L. & N., but seeks only to have the L. & N. bring into Court the fund or property theretofore decreed as belonging to the bondholders of the C. & O.

The judgment against the L. & N. was drafted in conformity with the idea that nothing save the recovery of specific property was involved in the litigation. The judgment provides (Record, page 308):

"And it is adjudged and ordered that the said response to the said rule is insufficient, and that the said rule is made absolute, and the said Louisville & Nashville Railroad Co. is ordered to pay into court the amount of judgment herein, the said sum of $90,053.34, as of March 21, 1898, subject, however, to the following credits."

The following facts are equally prominent upon the record:

That the Court had jurisdiction of the parties to and subject-matter of the suit.

That this was an action brought for the single purpose of enforcing a lien upon property.

That the property affected by the suit was within the jurisdiction of the Court, both the L. & N. and the L. C. & L. being Kentucky corporations, with their personal property located in Kentucky.

That the L. C. & L. and the L. & N. had notice of the institution and pendency of the suit, as well as its nature and objects; the L. C. & L. by actual service of summons, the L. & N. by direct participation in the action.

That the *res* only was impleaded, and the earnings were the real party defendant to the suit; the bondholders of the C. & O., the L. & N., and the L. C. & L. all appearing as claimants of the property.

We submit that these facts combining, a proceeding *in rem*, or, as some authorities put it, a proceeding in the nature of a proceeding *in rem*, resulted. In support of this position we quote the following from Works on Courts and their Jurisdiction. Section 14 relates to jurisdiction *in rem*, and reads as follows:

"Jurisdiction of property is acquired by a seizure of or levy upon the same under some proper writ issuing out of the Court having jurisdiction over such property, *or arises from some contract lien existing against the property and which is sought to be enforced.* But such acquisition of jurisdiction, in order to be effectual, must be followed by a notice in some form to the party whose rights are to be cut off or affected by the decree against the property. . . . There are many cases, however, in which *no seizure of the property is necessary.* If the action is *to enforce a lien upon the property created by contract, as for example a suit to foreclose a mortgage, seizure on the property is not necessary.* The fact that the property is within the State is the essential fact upon which jurisdiction depends in that class of cases, but in such cases notice in some form is necessary to give jurisdiction."

We quote this authority as showing that an actual seizure of property is not essential to a proceeding *in rem.*

We find that Mr. Justice Field sanctions such a proposition of law in the case of Pennoyer v. Neff (95 U. S. 714), where he says:

"Property in the State is brought under the control of the Court and subject to its disposition, by process adapted to that purpose, *or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem.*"

Mr. Justice Gray, in Scott v. McNeal (154 U. S. 34), has this to say on the subject:

"Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceeding, and *who had notice either actually or by the thing condemned being first seized into the custody of the Court.*"

If this was an action *in rem*, then the L. & N. Railroad, with notice of the pendency and nature of the suit, was bound by the judgment affecting the *res*, and the provision of the Constitution relative to "due process of law" has been satisfied.

As outlined above, the question of this Court's power to disturb the decision of the State Court holding that this was a proceeding *in rem* is reserved for later discussion.

The L. & N. having in every aspect of the case defended the action in the protection of an interest which it had in the litigation, the corporation is bound by the judgment, notwithstanding the fact that it was not named of record.

This, in brief, is the decision of the Kentucky Court of Appeals. Plaintiff in error complains that such a decision contravenes the provision, "Nor shall any State deprive any person of life, liberty, or property without due process of law."

In short, plaintiff's position resolves itself into the contention that a party *must be named of record before judgment can be rendered against it.*

What are the facts of this case, presented more in detail?

The charges of the affidavit filed in support of the rule stand both confessed by the response to the rule and proven by the pleadings and the evidence of the antecedent record. From this affidavit the following facts are developed:

(1) The L & N. Railroad had succeeded to the property rights and possessions of the L. C. & L., including the lease of the C. & O. held by the L. C. & L.; and that such succession had imposed on the L. & N. all the duties and liabilities of that lease. (Rec. p. 262–270.)

(2) The L. & N. had received and reduced to its possession and use all the net earnings accruing to the L. C. & L. from and over the C. & O., which earnings had, to the last dollar, been assigned and mortgaged to the Trustees of the C. & O. bondholders. (Rec. p. 270.)

(3) The earnings so received by the L. & N. were the *res* and subject of the suit instituted in October, 1885 (and now up for review before this Court). (Rec. p. 270.)

(4) In such suit the L. & N. employed counsel to defend, not for the L. C. & L., but for itself. The L. & N. filed the pleadings in the case. The L. & N. adduced and examined all the witnesses heard in behalf of the defense to the action. The L.

& N. prosecuted the several appeals in the case to the Kentucky Court of Appeals. (Rec. p. 270.)

Under these circumstances and with these conditions boldly prominent in the case, the Kentucky Court of Appeals held that the L. & N. was the real party defendant to the action and bound to respond to the judgment decreeing that earnings had accrued and belonged to the C. & O. bondholders. Was such decision based on due process of law?

What is Due Process of Law?

Judge Cooley, in his work on Constitutional Limitations, gives this definition, page 355:

"Due process of law means such an exercise of the powers of government as the settled maxims of law permit and sanction."

Said Mr. Webster in his Dartmouth College argument:

"It is the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

In Davidson v. New Orleans, Mr. Justice Bradley uses this language in judging what is "due process of law":

"Respect must be had to the cause and object of the taking. . . . If found to be suitable or admissible in the special case, it will be adjudged 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

These three statements, differing so widely in their scope and purview, considered together about exhaust all the phases of "due process of law." Let us measure this case by the standards above presented.

What do the settled maxims of the law permit and sanction on the subject of the necessity of naming a party in the pleadings before holding him concluded by the judgment?

Freeman on Judgments has this to say:

"Of Persons Bound, Though Neither Parties nor Privies."

(Section 174.) "'Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies.' Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person.

(Section 175.) "For the purpose of showing that parties not named in the record were the real parties in interest, and conducted the suit in the name of others, who were only nominal parties, parol evidence may always be offered, and when the showing is made, the real parties are concluded by the judgment."

Black on Judgment states the law as follows:

(Section 539.) "Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record."

(Section 540.) "A person who is not made a defendant of record may still subject himself to be concluded by the result of the litigation if he openly and actively and in respect to some interest of his own assumes the defense of the action."

Herman on Estoppel treats the subject in this language:

(Section 156.) "It is not always essential to the creation of an estoppel that the person should be a party to the record. One who instigates and promotes litigation for his own benefit by employing counsel or binding himself for costs and damages will be bound by the litigation or procedure as much as the party to the record.

(Section 182.) "Parties in the legal sense are all persons having a right to control the proceedings, to defend, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies."

Van Fleet on Former Adjudication (Section 523) says:

"If one who has an interest in an issue involved in litigation between others openly aids in the defense, the judgment settling that issue will make it *res adjudicata* between him and the plaintiff."

Jones, in his Law of Evidence (Section 602), discusses the proposition now considered in the following statements:

"In discussing the conclusiveness of judgments upon parties and privies, Mr. Greenleaf lays down the rule that 'parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision.' Hence a judgment may be evidence against and conclusive upon the rights of one who was not a nominal party in the former proceeding, if he is the person who controlled and directed the action, but the mere fact that one has contributed to a defense does not make the judgment conclusive upon him. But generally one who defends or prosecutes by employing counsel, paying costs, and doing those things that are generally done by a party, will be bound by the judgment, though not a party."

The American and English Encyclopedia of Law, under the title of Judgments (Vol. 12, page 97), epitomizes the law as follows:

"A judgment is binding upon persons who are not parties upon the record when the action is conducted in their behalf, and they have the right to control the proceedings, examine witnesses, and appeal from the judgment. Parol evidence is admissible to show that parties not named in the record were such real parties in interest."

Again, in Volume 21, page 177, it is said:

"Parties are those who have the right to control the proceedings in an action. They may or may not be parties to the record, the interest they have in the suit and not their record status determining their relation to the suit. . . . The record party may be ignored by the court and the party really interested may be the one whose standing and position in the case will alone be considered in the disposition of the case."

The Court will find that these statements of the law as laid down in the various text-books mentioned are supported by decisions of both Federal and State Courts.

From a legion of adjudicated cases containing an announcement of the law by almost every court of the land, we quote the following as showing how universally the proposition for which we contend has been sanctioned and approved.

In the Eagle Mfg. Co. v. Bradley Mfg. Co. (50 Fed. Rep. 193), the U. S. Circuit Court for the northern district of Illinois quotes the law as follows:

"The rule laid down in Robbins v. Chicago City, 4 Wall. 657, seems to me fully applicable in this case. There the court said:

"'The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.'

"Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit v. Morgan, 7 Wall. 619; Miller v. Liggett, etc., Co., 7 Fed. Rep. 91; Claflin v. Fletcher, *Id.* 851; American Bell Tel. Co. v. National Imp. Tel. Co., 27 Fed. Rep. 666; Morse v. Knapp, 37 Fed. Rep. 352; Lea v. Deakin, 11 Biss. 23, 13 Fed. Rep. 514; Wilson's Ex'r v. Deen, 121 U. S. 525, 7 Sup. Ct. Rep. 1004.

"The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case, made itself the *dominus litus* in that case; it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found; and may, I think, with entire propriety, be held to be bound, not only upon all the questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case."

Lovejoy v. Murray (3d Wallace, 18) was a case involving the liability of a plaintiff in an attachment suit, who had taken

upon himself the defense of an action brought against the attaching officer on the attachment bond, to answer a judgment rendered against such officer. Mr. Justice Miller, in passing upon the conclusiveness of the judgment against the officer as affecting the plaintiff in the attachment suit, who was not a party to the suit on the bond, has this to say:

"They (referring to the plaintiff in the attachment) were defending their own acts, although the suit was in the sheriff's name. They had every right to make all the defense there which they could and would make. They could adduce witnesses and cross-examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf as rendering a former judgment conclusive in a second suit. 'Justice requires,' he says, 'that every cause be once fairly and impartially tried, but the public tranquility demands that, having been once so tried, all litigation of that question and between the same parties should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he is not a stranger he may well be bound. Under the term "parties" in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give the full effect to the principle by which parties are held bound by a judgment, all the persons who are represented by the parties and claim under them, or in privity with them, are concluded by the same proceedings.'"

Says the Court in Bennett v. The Star Mining Co. (119 Ill., page 9):

"Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person fall within the category (of cases *res adjudicata*), and in such cases parol evidence is permissible to show who are the real parties in the case, and that they conducted the litigation in the name of other persons."

In Marsh v. Smith (73 Iowa, 295), the Court lays down the law as follows:

"Counsel for the defendant insists that the transcript of the judgment of the United States Court was erroneously admitted in evidence, and does not support the judgment of the court below for the reason that it is not shown that the defendant was a party thereto. . . . . The abstract shows that the Circuit Court was authorized to find that the defendant had knowledge of the suit and advised and authorized the employment of counsel to defend it for him. Being interested in the suit, and thus aiding in its defense, he was bound by the judgment."

We quote the following from Elliott v. Hayden (104 Mass. 180):

"It is argued for the plaintiff that the defendants were the real parties in interest; directed the attachment, agreed to indemnify the officer, took control of the action against him, and had the property sold by agreement between him and themselves. If these propositions were sustained in fact, the judgment in that action would doubtless be conclusive."

The Supreme Court of Georgia in the case of Linton v. Harris (78 Ga. 265), announces the law in these terms:

"Linton seems to have carried on the suit in Hull's name for his benefit, and the result was that Harris obtained a verdict upon the plea that consideration of the note had failed to the extent of the value of this one lot of land. Then Linton brought an act of ejectment against Harris for the lot of land. . . . . The case as Linton puts it looks rather striking and strong in favor of Mr. Linton, but although he was not a party on the record he really conducted the litigation, and was trying to take the benefit of that litigation, and the judgment would bind him absolutely in any subsequent action on the note. Now, if it would bind him in another action on the note, we think he is bound anywhere and everywhere that he encounters Harris on that same question, even in an action of ejectment."

The case of Daskam v. Ullman (74 Wis. 474) states a proposition in line with the above decision as follows:

"The defendants (not named as parties to the record) knew of the commencement of that action, and that the defense of pay-

ment had been set up in the answer. They consulted with the attorney who brought the suit about this defense; said they would take care of it. They furnished all the witnesses on the trial of that issue, and paid them. They were themselves sworn and made doubtless the best defense they could. Indeed, it appears that they had the entire management and control of the case so far as the issue of payment was concerned. They did not employ other attorneys, doubtless because they were satisfied with those who had charge of the case. But they had a full opportunity to be heard on the question of payment, and did actually defend and meet that issue. Presumably they made all the defense they could upon the issue, but the court found against them. . . . . In this case the evidence shows that the defendants not only had the opportunity to be heard on the defense of payment, but they were actually heard on that issue. They seem to have had the absolute control and management of the case so far as the issue of payment was concerned. We perceive no reason why upon the facts they should not be held concluded by the judgment in the foreclosure action.

"Adams v. Filer (7 Wis. 306), Robbins v. Chicago (4 Wall 657), Carpenter v. Pier (30 Vt. 81) are a few of the many cases which might be cited to sustain the view we have expressed."

The Supreme Court of Indiana deals with the question after this fashion in the case of Palmer v. Hays (112 Ind. 289):

"If it was true, as the appellant proposed to prove, that in the former suit Hays was the real party, and that he personally conducted the suit in the names of the replevin bail under an agreement to pay all expenses and costs, then he was so far in privity with the nominal parties, with whom he was identified in interest, as to be concluded by the judgment. 'The fact that an action is conducted in the names of nominal parties can not divest the case of its real character; the issue was made by the real parties, and the actual interests involved must determine what persons are precluded from again agitating the questions, and who are estopped by the previous decision.' (Freeman on Judgment, Section 174; Mortgomery v. Vickory, 110 Ind. 211; Train v. Gold, 5th Pick. 380.)

"'There are,' said Cowen, J., in Jackson v. Griswold (4th Hill, 522), 'certainly many cases where a party, though not nominally party to the suit, shall yet be concluded by it, because he has in fact taken the management of the cause; nay, where he has had notice of its pendency and a chance to litigate, but neglected to do so.'"

In Coats v. Roberts (4th Rawle, 112) is the following terse statement of the law:

"Whoever has an interest, and has notice, and takes part in a trial, is bound, though not named in the record."

We quote as follows from Van Knoughnet v. Dennie (68 Hun, 179):

"But it appears that the plaintiff in the present action was active and mainly instrumental in prosecuting the action brought by her husband and in establishing the claims therein, which were allowed to him by the Justice of the Peace. At the trial of the present action Mrs. Van K. testified that she attended the trial of the former action; that she conducted her husband to the Justice's office and back again because he was blind; that she heard plainly all that was said in the room; that she gave evidence as a witness; that she knew that her husband was going to bring suit; that she took note of the proceedings, etc. . . . Under these facts, notwithstanding the former assertion by her that she did not know, and was not informed that her claims made in this action were litigated and determined in the other action, the plaintiff is, as seems to us, conclusively estopped by her acts, which procured the judgment in the former cause. Having by her own affirmative acts and testimony procured a judgment of the Court, she can not now be permitted to allege and prove as against the same party any fact inconsistent with the integrity of that judgment. . . . This case therefore rests upon the doctrine that a person who has by his acts procured the rendition of a judgment in a given case can not afterwards be heard to impeach that judgment in any respect for his own benefit."

The statement of law following is taken from Stoddard v. Thompson (31 Ia. 80):

"One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by the party, is bound by the judgment rendered therein."

The case of Lyon v. Stanford, 15th Stewart (New Jersey Equity), 411, contains a statement of the proposition under discussion. The opinion reads as follows:

"The charge of the trial judge also shows that the case was presented to the jury, as conclusive of all controversy over the rights of the plaintiff averred in the declaration. I can not doubt that if Ann Lyon had been named as a defendant with her husband, her knowledge of and participation in the suit would have been just what they were, and the conduct of the cause would have differed in no respect from that actually pursued. The defense was in reality her defense, interposed with her consent, by her agent, and substantiated on her behalf, and if it had prevailed,she would have insisted,and with justice, that it estopped the plaintiff from any further denial of her right to maintain the building which her husband had erected for her. Under these circumstances, the mere absence of her name from the record will not absolve from the binding force of the judgment. The judgment becomes conclusive not only on the apparent parties, but also on those who are the real litigants."

Cumulative on the same point are Conger v. Chilcote, 42 Iowa, 18; Estelle v. Peacock, 48 Mich. 469; Gill v. U. S., 7 Ct. of Cl. 522; Follansbee v. Walker, 74 Pa. St. 306; Bennett v. Wilmington S. M. Co., 18 Ill. App. 17; Tate's Ex'rs. v. Hunter, 3 Strob. Eq. 136; Wood v. Ensel, 63 Mo. 193; Ven Plank v. Van Buren, 76 N. Y. 247; Montgomery v. Vickery, 110 Ind. 211; Cole v. Favorite, 69 Ill. 457.

The decision of the Kentucky Court of Appeals is in substance and effect, that the Louisville & Nashville Railroad was the real party defendant in the suit of Schmidt v. Louisville, Cincinnati & Lexington Railway Co., and as such was bound to perform the judgment rendered in that action; because the L. & N. had avowedly and alone conducted the entire defense in the cause in the protection of an interest which it had in the litigation, and the issue between it and the C. & O. bondholders had already been determined by the same means, in the same manner, and to the same extent as if the L. & N. had been named of record.

Under the authorities cited, we submit that the settled maxims of the law both sanctioned and required such a ruling. Had the action of Schmidt v. L., C. & L. resulted in a judgment for the defendant therein, and the bondholders had then sued the L. &

N., there can be but little doubt what the defense to the second action would have been, *res adjudicata*, with emphasis.

Applying now Mr. Webster's rule, we shall content ourselves with the statement that for more than fourteen years the plaintiff in error has been heard in every possible defense that legal capacity could devise to meet the exigencies of this action. Further, that the proceedings have been upon the most careful and extensive inquiry, an inquiry which necessarily involved the merits of the L. & N.'s contention that it was entitled to the possession of the property sought to be recovered in the action. Further, that the judgment was entered after the fullest and fairest trial of the issue as the L. & N. saw fit to raise it. The record speaks so eloquently on this subject that we refrain from argument.

These features of the case being made to appear, surely there is nothing arbitrary, oppressive, or unjust about the proceedings, save and except the part which plaintiff in error has played. It has kept this case in court until the worry and turmoil of contest have grayed the hair of lawyer and litigant, and costs representing a fortune have emptied the pockets of the humbler party.

We do not intend to make specific application of the various authorities cited to the case at bar. This Court can and will draw its own conclusion.

Reviewing the citations in a general way, we would suggest that we have yet to discover a text-writer or court who makes the naming of a party in the record a necessary element of "due process of law." Such a requirement would reduce law to an absurdity, and render the forum a stage for farce. To contend that the mere absence of a party's name from the record stays completely the hands of the Court in the administration of justice is to throw away the oyster and offer to litigants the consolation of a shell. Such a doctrine does nothing short of sanctioning fraud. Such a policy puts a premium on purely champertous litigation. Nothing would so encourage and foster legal strife as to permit one to fight another's battles, incidentally

fighting his own, and be immune from all consequences of conflict.

It will not do for a party to employ the process of a Court for fourteen years in the attempted vindication of a right or a position, and at the end of that time, when judgment is found against it, to tell the Court that it has only been in the struggle for excitement, and has only litigated in a spirit of fun.

With the facts of the case, as we have before stated them, undisputed by even a suspicion of contradiction or denial, we submit the following conclusions:

The L. & N. had every motive and inducement for appearing in the litigation and conducting a defense.

The case involved the vital issue of whether $90,000.00 of earnings held by the L. & N. belonged to the C. & O. bondholders.

The litigation offered opportunity for the L. & N. to have determined every question concerning its right to hold the $90,000.00 sued for, and its liability to answer the bondholders in that amount.

The L. & N. knew that the nominal defendant, the L., C. & L., could not and would not defend the action. The L., C. & L. was really no longer in existence, its mere license to exist being but a fiction of law. The L., C. & L. had no means for conducting a defense; it had no motive to do so. To it, success and failure signified nothing.

With this incentive to action, the L. & N. took up the fight and carried it on for fourteen years, litigating every possible phase of its indebtedness to the bondholders of the C. & O.

The L. & N. was the real defendant to the action, and rightly held concluded by the judgment.

We consider it unnecessary to elaborate the various conclusions stated above. To us they appear as manifest as the facts and premises upon which they are based.

Say that the allegations made by the affidavit, the basis of the rule, had been controverted by the L. & N., and on the issue

thus joined proof had been taken and judgment rendered in favor of the bondholders, would there then be any doubt or question of the L. & N. having had its day in Court? Is the case less strong because the statements of the affidavit did not admit of a successful traverse and come to this Court unchallenged and admitted?

We do not believe that this Court will require the defendants in error to again jeopardize their interest by submitting for a second trial an issue that has already been heard and determined. There has been no hardship worked upon the plaintiff in error in this case. Having admitted by its response that it had collected the money for which judgment was entered against it, and that such collection had been had under circumstances which offered no possible cause for retaining the money, manifest right and justice decree that restitution should be made.

Res Adjudicata on Rule and Response.

Not only was the L. & N. a party defendant to the suit against the L., C. & L., but by its response to the rule issued for the purpose of establishing that fact, it made such defense as to render the entire litigation *res adjudicata* against it. The L. & N. in its response, in addition to allegations by which it attempted to inject a Federal question into the case, raised an issue going to the very merits of the controversy. Having been heard and defeated on that issue, it can not now say that a day in court has been denied it.

We quote from the response of the L. & N., pages 294, 295 of the Record: "Respondent says that this suit was instituted against the Louisville, Cincinnati & Lexington Railway Company upon a contract duly signed and delivered by it. . . . . The lease of the road and franchises of the Northern Division of the Cumberland & Ohio expressly provided that no assignment thereto should be made except upon the written consent of the lessor; and although the respondent requested of said Cum-

berland & Ohio Northern division to assent to said assignment, this respondent, notwithstanding said refusal, entered upon and continued to operate said road." (Rec. p. 295.)

By these allegations the L. & N. denied its liability on the contracts existing between the bondholders of the C. & O. and the L., C. & L., and thus sought to avoid the responsibility of the judgment rendered against the L., C. & L. Upon this issue, proof was introduced in the shape of affidavits, setting forth the proceedings in the Shelby Circuit Court in which, under the decision of the Kentucky Court of Appeals, the L. & N. was held bound by the provisions of the contracts above referred to. On this proof the Court held the response on the merits insufficient and entered judgment, of which the plaintiff in error now complains. (Rec. p. 296, 297.)

It will therefore be seen that the L. & N. not only litigated the case in the name of the L., C. & L., but in its own name presented an issue on the rule which involved a consideration of its liability upon the whole claim presented. On both phases of the action, judgment has been rendered against it, and yet it complains of a want of due legal process.

Has This Court Jurisdiction?

We come now to a most important question reserved for the conclusion of this argument, because what has been heretofore said prepares the Court better to comprehend it. Will the Supreme Court review the decision of the Kentucky Court of Appeals? We contend that the writ of error did not properly lie in this case, and that this Court has no jurisdiction to sanction or disapprove the adjudication of the State Court.

Certainly every case decided by judge or jury involves the question of process of law. Law and process of law are in a measure convertible terms. So all litigation involves in one sense of the phrase "due process of law," for whether a case is determined rightly or erroneously necessitates a consideration of

whether the legal processes employed in reaching a judgment have been due and proper. Webster defines "due" as "proper." But this does not mean that every case decided by the State Courts can be brought to the Supreme Court for review. As a matter of fact, it is seldom, indeed, that this Court has allowed a writ of error based on the statutory edict providing "due process of law." The very allowance of the writ implies the exercise of arbitrary power on the part of the State Judiciary, a power repugnant alike to fairness and law.

"No man shall be deprived of property without due process of law," is the title of a composite picture of every scene in Anglo-Saxon history It but re-echoes the cry first heard at Runnymede, "No divine rights," "no tyranny," "no confiscation." It was intended as a pledge to the world that on this side the Atlantic there should be no such mockeries of justice as had disgraced the forums of the Old World.

But "due process of law" does not denounce every erroneous decision of the Courts as unconstitutional. It does not guarantee that on every proposition affecting property the judgment of the State Court should be subject to review and reversal by the Supreme Court of the United States. It was not intended that because a record contains an adjudication relative to parties to actions that it can properly be brought to the consideration of this tribunal.

Says Mr. Justice Waite in Arrowsmith v. Harmoning (118 U. S. 194):

"The constitutional provision is, 'Nor shall any State deprive any person of life, liberty, or property without due process of law.' Certainly the State can not be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The legislature of a State performs its whole duty in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the Courts, and the parties are left to the proper remedies for correction of errors in judicial proceedings."

Upon this subject it was said, in the case of Allen v. Georgia, 166 U. S. 138, 140, as follows:

"To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State had acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. *We might ourselves have pursued a different course in this case, but that is not the test.* The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

This statement is quoted with approval in Hovey v. Elliott, 167 U. S. 409, 443, and Wilson v. North Carolina, 169 U. S. 593.

Thus prefaced, we venture the assertion that the judgment of the Kentucky Court of Appeals in the case of the L. & N. Railroad v. Schmidt was based on such broad and general propositions of law as to forbid this Court denying the State Court the right to decide as its reason and policy seemed best. The Kentucky Court of Appeals held that the judgment against the L. & N. was based on the dual findings—(1) that this was a proceeding *in rem*, and (2) that the L. & N. being the real party defendant to the suit, was concluded by the judgment. Surely there is foundation for both rulings. On the question of this being a proceeding *in rem*, read the Record. The relief sought was the enforcement of a lien upon certain property, viz: the earnings of the L. C. & L. from or over the C. & O. The existence of such lien and the right to have it enforced constitutes the issue of the entire litigation. The State Court held that the action was a proceeding *in rem* or an action in the nature of a proceeding *in rem*, and that the L. & N., having the fullest notice, was bound by the judgment affecting the *res* in

controversy. That there is authority for such decision is developed by citations already made in a preceding portion of this brief.

But, considering the decision right or wrong, will the Supreme Court review this solemn announcement of general law and say what shall be or what shall not be proceedings *in rem* in Kentucky?

We answer this in the language of Mr. Justice Brown in the case of Woods v. Brady (150 U. S. 18):

"The question of whether an action to foreclose a lien of this kind is *in rem* or *in personam* under the practice in California is one upon which the decision of the Supreme Court is binding, and its ruling that the plaintiff, being no party to its suit to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a proper subject for review by this Court.

"In no aspect does the case present a Federal question, and the writ is dismissed."

Again, the Kentucky Court of Appeals held the L. & N. bound by virtue of the general proposition of law which we have heretofore announced and supported, viz., that a party who directs the defense of an action can not deny his liability to perform the judgment entered in the cause. *Such a decision by the State Court is but an application of the equitable principle of estoppel.*

The proposition regarding conclusiveness of judgments as to persons not named in a record is a department of the doctrine of estoppel. Black treats and discusses the subject under the head of "Estoppel by Judgment" (2 Black on Judgment, Section 540). Herman considers the question under the title of "Estoppel in its Application to Personal Judgments, or Judgments between Parties" (Herman on Estoppel, Section 129). Freeman works out the doctrine through the medium of estoppel (Freeman on Judgments, Section 174). So through the entire list of text-books and case law, the principle, wherever

applied, has been based upon this theory. The Court will perceive from the very nature of the proposition that it is founded on estoppel. A person will not be heard to deny his liability on account of an action when he has been in the Court defending the litigation, is a perfect example of the equitable principle of estoppel. The Court of Appeals of Kentucky, therefore, in the announcement of the law by which it held the L. & N. bound by the judgment rendered in the case of Schmidt v. the L. C. & L., but applied to the facts of the case a general and well established principle of equity jurisprudence.

The law announced by the State Court in this action is also based upon a principle of State policy. To permit a person to conduct an extensive and expensive litigation merely for amusement, as the L. & N. would have the Court believe it proceeded in this case, means to harass and hamper Courts, and seriously impede the administration of justice. To discountenance such practice, a State, in the settlement of its judicial policy, establishes a rule by which the party litigating is held bound by the result of the litigation.

If either of these contentions be correct, and this decision of the Kentucky Appellate Court rests on principles either of estoppel or policy, then this Court is without jurisdiction to review that decision. This Court has repeatedly announced such to be the law.

The decision of Israel v. Arthur (152 U. S. 361) seems to us decisive upon this question. We quote from the opinion of Mr. Chief Justice Fuller:

"The Supreme Court of Colorado ruled in Arthur v. Israel (15 Col. 147) 'that public policy required that when the wife without cause deserts her husband and home, and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continually lives and cohabits with him as his wife, she may not, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of

proper service of process, and successfully assert against other heirs her right under the statute of descents and distribution to deceased's estate as his widow.' And on the subsequent writ of error it sustained the judgment of the county court against plaintiff in error upon the facts.

"With the conclusion on the facts we have nothing to do, and the conclusions of law were conclusions in matters of local and general law which suggest no Federal question.

"By stipulation of record plaintiff in error admitted at the trial that the invalidity of the divorce decrees being conceded, the only question to be tried was whether she was 'estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees, or whether she has ratified them by her conduct.'

"That question was determined against her, and the judgment rested solely on the ground that she could not under the facts be allowed, as to John Arthur's personal estate, to assert the property rights conferred by law upon a widow. To review that judgment would be to overhaul the application by a State court of principles of public policy and of estoppel, which is not within our province to do. This was so held in Morrow v. Brinkley, 129 U. S. 178, and in effect in many other cases. Adams County v. Burlington & Missouri Railroad, 112 U. S. 123; Chouteau v. Gibson, 111 U. S. 200; Beaupre v. Noyes, 138 U. S. 397.

"In Eustis v. Bolles, 150 U. S. 361, it was ruled that a decision by the Supreme Judicial Court of Massachusetts that a creditor of an insolvent debtor who proved his debt in insolvency proceedings under the State statutes and accepted the benefits thereof, thereby waived any right he might otherwise have had to object to the validity of the insolvency statutes as impairing the obligation of contracts, presented no Federal question for review. And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. Dower v. Richards, 151 U. S. 658, and cases cited."

This Court, in Gillis v. Stinchfield (159 U. S. 658), said:

"But the decision of the Supreme Court was clearly based upon the principle of estoppel deemed by the court to operate against the plaintiff in error upon general principles of law and the statute of California in respect of such a conveyence as that to Stinchfield, and irrespective of any Federal question. The writ of error must therefore be dismissed."

To the same effect is the decision in the case of the Electric Company v. Dow, 166 U. S. 490.

Morrow v. Brinkley, 129 U. S. 178, contains a statement of the law in the following language:

"Conceding that Wests's title to the particular land had been divested by sale under the confiscation proceedings, and that the interest of the heirs remained unaffected thereby, yet if they were concluded under the circumstances by the deed of May, 1872, or upon the principles of estoppel and laches, that disposed of their case adversely; and it was upon these grounds that the Virginia Courts proceeded, and not upon any decision against any right, title, privilege, and immunity claimed under the Constitution or any statute of the United States.

"Unless it appears affirmatively that the decision of a Federal question was necessary to the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this Court has no jurisdiction of a writ of error to a State Court."

The statement of the law as contained in Sayward v. Denny (158 U. S. 180) seems equally controlling on this motion. The Court says:

"The contention is that the results of the rulings and decisions of the trial court as affirmed by the Supreme Court was to hold plaintiff in error conclusively bound by the judgment rendered against Crawford in an action 'in which he was not a party, and of which he had no notice'—and that this was to deprive him of property without due process of law. . . . .

"We are not called on to review these views of the principles of general law considered as applicable to the case in hand. The State Courts were never led to believe that a protection under the Constitution was invoked. . . . And we might add that the decisions of State tribunals in respect of matters of general law can not be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

We close this feature of the case with these citations, not that they exhaust the authorities on the question, but because they serve to indicate how well established is the rule and principle for which we contend.

The discussion establishing the contention that the Federal question was not raised in time will be presented by associate counsel.

With this, we close the case for defendant in error. The statement of the facts has been made somewhat elaborate, and the citations in numbers, with the hope that some labor might thereby be saved the Court.

Defendant in error asks that his motion to dismiss or affirm be sustained, and to this end the foregoing argument is most

Respectfully submitted,

JOHN G. SIMRALL,
For Defendant in Error.

EDMUND F. TRABUE,
TEMPLE BODLEY,
JOHN C. DOOLAN,
BENJAMIN F. WASHER,
Of Counsel.

APPENDIX.

POINTS MADE AND AUTHORITIES CITED.

On Motion to Dismiss.

The State Court held that the question of whether the plaintiff in error had been the real party defendant to the suit of Schmidt, Trustee, v. Louisville, Cincinnati & Lexington Railway Co. could be and was determined by proceeding by rule and response. The form sanctioned gave notice to the plaintiff in error, and afforded it fair opportunity to be heard. The fact that the investigation was on motion instead of a new action instituted in no way rendered the proceeding not "due process of law."

Iowa Central Railway Co. v. Iowa, 160 U. S. 392.

The State Court held that this was a proceeding *in rem*, and that the plaintiff in error, having had the fullest notice of the action, was bound by the judgment affecting the *res*. This decision of the State Court presents no Federal question.

Woods v. Brady, 150 U. S. 18.

The State Court held the plaintiff in error bound by virtue of the general proposition of law, that a party who directs the defense of an action in the protection of an interest which he has in the litigation can not deny his liability to perform the judgment entered in the cause. This decision of the State Court, being based upon the principles of estoppel and policy, is not reviewable by the Supreme Court.

Israel v. Arthur, 152 U. S. 361.
Gillis v. Stinchfield, 159 U. S. 658.
Electric Company v. Dow, 166 U. S. 490.
Morrow v. Brinkley, 129 U. S. 178.
Saywood v. Denney, 158 U. S. 180.
Eustis v. Bolles, 150 U. S. 361.

The fact that the Supreme Court might have pursued a different course in the case is not the test of "due process of law."

Arrowsmith v. Harmoning, 118 U. S. 194.
Allen v. Georgia, 166 U. S. 138.
Hovey v. Elliott, 167 U. S. 409, 443.
Wilson v. North Carolina, 169 U. S. 593.

ON MOTION TO AFFIRM.

This was a proceeding *in rem*, and the plaintiff in error with notice of the proceeding was bound by the judgment affecting the *res*. The fact that no actual seizure of property was had does not deprive the action of its identity as a proceeding *in rem*.

Work on Courts and their Jurisdiction, Section 14.
Pennoyer v. Neff, 95 U. S. 714.
Scott v. McNeal, 154 U. S. 34.

The plaintiff in error having in every aspect of the case defended the action in the protection of an interest which it had in the litigation, is bound by the judgment, notwithstanding the fact that it was not named of record.

Freeman on Judgments, Sections 174, 175.
Black on Judgments, Sections 539, 540.
Herman on Estoppel, Sections 156, 182.
Van Fleet on Former Adjudication, Section 523.
Jones on Evidence, Section 602.
The A. & E. Encyclopedia of Law, Vol. 12, page 97; Vol. 21, page 177.
Eagle Mfg Co. v. Bradley Mfg Co., 50 Fed. Rep. 193.
Lovejoy v. Murray, 3 Wall. 18.
Bennett v. The Star Mining Co., 119 Ill. 9.
Marsh v. Smith, 73 Ia. 295.
Elliott v. Hayden, 104 Mass. 180.
Linton v. Harris, 78 Georgia, 265.

Daskam v. Ullman, 74 Wis. 474.
Palmer v. Hays, 112 Ind. 289.
Coats v. Roberts, 4 Rawle, 112.
Van Knoughnet v. Dennie, 68 Hun, 179.
Stoddard v. Thompson, 31 Ia. 80.
Lyon v. Stanford, 15 Stewart, 411.

A party to an action is one who is directly interested in the subject-matter, who has a right to make defense, examine, and cross-examine witnesses, and appeal from the judgment.

Robbins v. Chicago, 4th Wall. 657.
Beloit v. Morgan, 7 Wall. 619.
Miller v. Liggett, etc. Co. 7 Fed. Rep. 91.
American Bell Tel. Co. v. Nat. Imp. Tel. Co., 27 Fed. Rep. 666.
Morse v. Knapp, 37 Fed. Rep. 352.
Wilson's Ex'r v. Deen, 121 U. S. 525.

The unanimity with which these propositions have been sanctioned indicates conclusively that the contentions of plaintiff in error are asserted but for delay.

Respectfully submitted.

JOHN G. SIMRALL,
For Defendant in Error.

No. 178.

U. S.

MAR 5 1900

JAMES H. McKENNEY,
Clerk.

Def. of Simrall v Trabue for D. C.

Supreme Court of the United States.

Filed Mar 5, 1900.

October Term, 1898.

No. ~~655~~. 178.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

vs.

ADOLPH L. SCHMIDT, in his own behalf, and as Trustee for the Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company, et al, - - Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

TEMPLE BODLEY,
JAMES S. PIRTLE,
JOHN C. DOOLAN,
BEN. F. WASHER,
Of Counsel.

JOHN G. SIMRALL,
EDMUND F. TRABUE,
Counsel.

P. C. NUNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

October Term, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - *Plaintiff in Error,*

vs.

ADOLPH L. SCHMIDT, in his own behalf, and as Trustee for the Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company, *et al*, - - - - *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

For brevity's sake we shall not re-state the facts, but rely upon the former briefs for statement, except sufficient to make this brief self-explanatory.

This suit was begun October 12, 1885, against plaintiff's vendor, to enforce the lien of a mortgage upon the earnings of plaintiff's railroad, previously owned by the Louisville, Cincinnati & Lexington Railway Company (hereinafter called L., C. & L. Co.), the mortgagor.

The case was stubbornly contested (really by plaintiff in error as hereinafter shown) in the Circuit Court and Court of Appeals—having made five appeals to the latter Court—until after more than eight years' litigation, judgment was entered June 1, 1894, ascertaining the net earnings covered by the mortgage to be $53,565.62, with interest, etc. (Rec., 214.)

Responsive to a rule to pay the earnings, the mortgagor said:

> "That in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this Court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it. HELM & BRUCE,
> (Rec., 215.) *"Attorneys for Defendant."*

To a rule to report the amount of net earnings accruing after the period covered by the judgment for $53,565.62, the mortgagor said that it

> "States and shows to this Court that it has not made any net earnings, or earnings of any kind, since the date aforesaid, on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid. HELM & BRUCE,
> *"Attorneys for Defendant."*

"M. H. Smith says that he is the President of the defendant, and that he believes the statements contained in the foregoing response are true." (Rec., 217.)

The unnamed vendee referred to in the responses was plaintiff in error (hereinafter sometimes called L. & N.)

Afterward, plaintiffs (defendants in error) tendered an amended petition showing that the defense of the suit had been made by the L. & N., who, it appeared, was the sole person interested in the property involved, and prayed that it be named a defendant of record, but its motion was overruled, and the order affirmed on appeal, the appellate Court declaring the proper practice to be either to institute a new suit against L. & N. upon the record of the present suit, or file an affidavit containing the averments of the amended petition, and thereupon obtain a rule against L. & N. to pay into Court the amount of the net earnings received by it covered by the mortgage, if the averments of the amended petition were established. (99 Ky., 148, 155; Appendix to former brief, p. 25.)

To such rule the L. & N. responded :

1. That it was not a party to the suit ; had not been named in a pleading, etc., etc.

2. That it could never "with propriety have filed an answer setting up its defense" at any time, and that to require it to pay into Court, as required, would deprive it of its property without due process of law. That if sued "in the usual and orderly way," it "could and would present good, valid, and subsisting defense."

3. That even if adjudged to pay, respondent (L. & N.) owned 250 coupons amounting to $16,524.37, etc., which should be credited.

4. That this suit was against L., C. & L. Co. on its contract, etc.; setting out at length matters which it is now urging in its brief, and alleging that the lease itself forbade assignment without lessor's consent, and the lessor had refused consent, and concluding:

"Wherefore, *having fully responded*, this respondent prays that the rule herein be discharged." (Rec., 295.)

Defendants in error replied to the response by affidavit filed March 23, 1898, asserting *res adjudicata* of the matters set up in the fourth item of the response, covering the assignment of the lease and the lessor's refusal to yield consent thereto; and showing that of the credit of $16,524.37, claimed in the response, $6,626.65 had already been credited in the judgment ascertaining the mortgaged earnings.

Upon the response and reply thereto, and upon the rule and affidavit of Schmidt, "and upon the entire record and proceedings of this action which have been heretofore ordered to be and are now read upon this hearing," etc., the Court, April 2, 1898, adjudged that the rule be made absolute, and that the plaintiff in error pay into Court the said earnings fixed at $90,003.34, subject to the credits adjudged in detail.

Upon appeal this judgment was affirmed as a "delay case" October 28, 1898. (Rec., pp. 308, 317.)

ARGUMENT.

I.

Plaintiff in Error had Opportunity of Full Hearing of All Its Defenses on the Rule.

From the elaborate proceedings on the rule just recited in the statement, it appears that plaintiff in error was accorded full hearing of every defense urged; that it urged several defenses personal to itself and not therefore adjudicated, and that some were adjudged in its favor; others were refuted by the reply of the defendants in error, and adjudged against it; and that still others were abandoned by it on fuller information as to the credits which it was claiming. It intimated that it had other defenses, but gave no evidence thereof, notwithstanding it had set up such defenses as it chose, and all those received full and fair trial.

Whether, therefore, the judgment awarding the rule contemplated the trial of the defenses which were actually tried or not, nevertheless plaintiff in error had a fair trial of those defenses, and there is no reason to suspect would not have had a fair trial of any other defenses urged, and a trial on rule and response, or even on motion, does not offend the constitutional provision of due process of law. (*Iowa Central Railway Company vs. Iowa, 160 U. S., 389; Brown vs. New Jersey* (*No. 290*), *decided November 20, 1899, advance sheets.*)

II.

Evolution of Plaintiff's Claims.

Plaintiff's doctrines have undergone such evolution during the progress of this case that it is difficult to keep pace with them.

a. In 1891—April 20—its counsel supposed plaintiff in error was the actual litigant defendant (and there being but one, the only litigant defendant), and in retiring from the case gave plaintiff this notice:

LOUISVILLE LAW AND EQUITY COURT.

SCHMIDT, ... *Plaintiff,*
vs.
L., C. & L. R'Y CO., . . *Defendant.*
} No. 1860. Notice.

The Louisville & Nashville Railroad Company will take notice that on Monday, April 20, 1891, at the motion hour, we will move the Court to strike our names from the record herein as attorneys for said company.

BARNETT, MILLER & BARNETT.

This notice was accepted by present counsel for plaintiff in error as follows:

NOTICE ACCEPTED.

HELM & BRUCE,
Attorneys for Defendant.

Thereupon the Court recited:

Came Barnett, Miller & Barnett and filed a written notice in this action duly accepted.

And on their motion their names are stricken from the record herein as attorneys *for Louisville & Nashville Railroad Company.* (Rec., p. 79.)

Promptly thereafter, said Helm & Bruce took depositions of divers L. &. N. officers.

Of H. M. Smith, who verified the response (Rec., 217), and who swore that he was the President of the Louisville & Nashville Railroad Company.

Of Edward Rowland (Rec., 174), Auditor of Receipts of the Louisville & Nashville Railroad.

Of Charles Haydon (Rec., 174), Assistant Comptroller of the Louisville & Nashville Railroad. And Haydon testified that his account was made out in his (L. & N.) office, from L. & N. books.

Sewell, author of the report of earnings, was Auditor of Disbursements of the Louisville & Nashville Railroad Company. (Rec., 72.)

It sounds strange, therefore, when plaintiff now asserts: "That it is not a party to this suit," etc., and that there has never been a time when it could "with propriety, have filed an answer setting up its defenses," etc. (Rec., 294.)

b. It is equally interesting to note the transition from plaintiff's position in the State Court to that in its brief, page. 37. In the former it said (99 Ky., 143; Plaintiff's abstract, p. 37):

> "This is not a case where one party—the real party in interest—defends the suit in the name of another. The fact that this suit was defended by counsel who represent the L. & N., and the fact that the same man was President of both companies should not operate to bind by a judgment one who was not a party to the suit in which it was rendered;"

But in its brief in this Court (p. 37) it concedes:

> "That if it (L. & N.) should be sued by plaintiffs (defendants in error), that judgment (the judgment now assailed) would be conclusive evidence against it on the *certain points adjudicated therein*, as, for example, on the question so bitterly contested, as to whether the contract covered the earnings on business account both ways or only one way, and on the item of the amount of such earnings."

This evolution and consequent elimination reduces the field of discussion to a narrow limit, viz.: if by the judgment assailed plaintiff in error was prevented from availing of any defense it had, if any, in addition to those it urged in the name of the L., C. & L. Co., and if so, if its property was thereby taken without due process of law.

The proposition of law as announced by the State Court, and sustained by the overwhelming weight of authority which was so bitterly contested by plaintiff in error, is now conceded by its counsel to the extent of the "*points*" actually "*adjudicated therein.*" (Brief, 37.) Plaintiff is now reduced to the contention that it is not concluded on any question not actually decided, although plaintiff had complete control of the defense, had an untrammeled right to cause the adjudication of any question it chose, and every question it ever raised was fully adjudicated.

PLAINTIFF'S STATEMENT OF ITS POSITION.

Plaintiff in error thus states its position:

"*There was no attempt made to impound any earnings. No application for a receiver, and no attachment taken out. Neither was any lien claimed on the corpus of the property of the defendant.* It was nothing more than a personal suit for an accounting between the two parties to a contract," etc. (Brief, p. 5.)

"A form of judgment which the Court of Appeals has since said in this action was '*essentially a personal judgment upon which the Court might have ordered execution to issue.*' (Page 6.)

"What, therefore, the Court meant by saying that the *proceeding*, seeking a judgment, was *essentially in rem*, but that the judgment, when thus obtained, was *essentially in personam*, we confess our inability to explain." (Page 14.)

Finally plaintiff thus states its proposition:

"QUESTION.—The question involved in this case is simply this: Where a personal judgment is entered against A. B. for a specified sum of money, can an execution, or a rule to pay same, be issued thereon against C. D., who is not named in the judgment, and is not even a party to the cause? And if this is done, and C. D.'s property is taken to satisfy the judgment, is this 'due process of law?'"

Plaintiff admits that the judgment assailed was for "the amount of earnings which the Court held that the defendant (L., C. & L. Co.) had received," but to sustain the claim that it is a judgment *in personam*, and not *in rem*, it contends

that the subject of the suit was nevertheless *money*, which "had no ear marks." (Page 31.)

Curious Result of Plaintiff's Position.

Plaintiff's own statement of its position, therefore, resolves its contention into the curious anomaly that plaintiff has not had due process of law *because money has no "ear marks."*

III.

Meaning of Due Process of Law as Applicable to this Case.

It appears, as above shown, that plaintiff in error defended for nearly nine years the suit to enforce the mortgage lien upon the earnings of *its* railroad, and upon rule to pay into Court the amount of such earnings, asserted defenses *not previously litigated*, and that such defenses were upon the rule considered and adjudicated; that it showed no evidence of having any other defenses, contenting itself with the declaration that if sued "it could and would present good, valid, and subsisting defenses" not specified; that defendants in error promptly combatted all the defenses presented in the response to the rule, defeated some, others prevailed, but could not compel plaintiff to assert its defenses, and there is no reason to suppose that any defense urged would not have been tried, nor indeed that plaintiff had any other defenses; so plaintiff stands in this Court upon the most narrow and strictly technical claims.

In Davidson vs. New Orleans, 96 U. S., 97, this Court, observing how long the provision in question had applied to the Federal Government, and how short a time to the States, and yet so large a number of cases had arisen in the States, said:

> "Thus is there abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court, the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded," etc.

This Court has often expounded due process of law as applicable to the case in Court, and never announced any rule which would condemn the judgment now assailed.

A litigant is not entitled to any particular kind of procedure, nor does the "Fourteenth Amendment"

> "Profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line." (*Missouri vs. Lewis, 101 U. S., 31; Brown vs. New Jersey, supra.*)

> "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme

law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. (Art. VI., Const.) Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." (*Walker vs. Sauvinet, 92 U. S., 93.*)

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." (*Brown vs. New Jersey, supra.*)

"The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary." (*Hurtado vs. California, 110 U. S., 516; Brown vs. New Jersey, supra.*)

Accordingly, it is held that, although an indictment by grand jury was an essential preliminary to trial for felony at common law, it is within the power of a State to abolish it entirely and proceed by information. (*Hurtado vs. California, supra, etc.; Hodgson vs. Vermont, 168 U. S., 262; Bolln vs. Nebraska* (*No. 393*), *decided January 15, 1900.*)

Proceedings for tax assessments may be summary, the only essential preliminary being the opportunity for a hearing upon the question of assessment. (*Bellingham Bay, etc., R. R. Co. vs. City of New Whatcom, 172 U. S., 320.*)

The same is true of proceedings in *ad quad damnum.* Accordingly this Court holds, upon a review of authorities, that:

> "Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." (*Leeper vs. Texas, 139 U. S., 468; Brown vs. New Jersey, supra.*)

> "Whether better or no than any other method, it is certainly a fair and reasonable way of securing an impartial jury, as provided for by the laws of the State, and that is all that due process in this respect requires." (*Brown vs. New Jersey, supra.*)

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and provides fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words." (*Iowa Central Railroad Company vs. Iowa, 160 U. S., 389.*)

From the foregoing brief quotation of this Court's language it is obvious that the requirement of due process of law does not entitle plaintiff to any particular kind of procedure general in its application to all the States, but that it is only entitled to the procedure in force in this State, unless it "work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution."

And that the decision of a State Court that the procedure in the case in hand "was in accordance with the laws of the State" is accepted as conclusive by this Court.

It is equally well settled that whether the procedure be by action, rule, motion or other method, it is due process of law, "provided the form sanctioned by the State law gives notice and affords an opportunity to be heard."

Accepting the decision of the State Court as evidence of the State procedure—and especially where it is declared by that Court to be based upon its previous decisions—the sole question presented to this Court is whether or not the plaintiff in error had notice and an opportunity to be heard in the State Court.

In support of its decision the State Court invoked a long line of authorities, State and Federal, defining *dominus litis*, and declaring plaintiff in error concluded by the judgment in the case in the trial of which it had participated.

We shall not review these authorities; they are collated in the opinion, *99 Ky., 143*, and briefs filed by us on motion,

viz., of John G. Simrall, page 26, *et seq.*, of Edmund F. Trabue, page 20.

To the authorities cited should be added *Plumb vs. Crane, 123 U. S.*, and *Washington Gas Light Co. vs. District, 161 U. S., 316.* Not only do these decisions conclude plaintiff in error on the question of notice, but, as above indicated, plaintiff now concedes that its conduct in this suit prior to the rendition of the judgment of 1894 "*would be conclusive evidence against it on certain points adjudicated therein.*" (Brief, p. 37.)

Being concluded by the adjudication, plaintiff was necessarily a party to the controversy culminating in the adjudication. This was true either because the summons delivered to its President was service upon it or because it voluntarily entered its appearance. Either service of process or voluntary appearance would conclude plaintiff by the adjudication and affect it with legal notice of the pendency and result of the suit. It remains, therefore, only to inquire if plaintiff was afforded "an opportunity to be heard."

Opportunity to be Heard.

If plaintiff had an opportunity to be heard there was due process of law, because its failure to be heard was its own fault. Accordingly, the State Court properly concluded that plaintiff in error was a party, upon the facts asserted by defendants in error and not controverted, and correctly held plaintiff concluded by the judgment. Being *dominus litis*,

plaintiff in error was, upon the authorities invoked in the State Court, concluded not only by what was decided, but by what might have been properly decided in the suit; thus in *Eagle Mfg. Co. vs. Bradley Mfg. Co.*, *50 Fed.*, *193* (affirmed on appeal, *57 Fed.*, *980*), the Court declaring one whose name did not appear of record, concluded by the judgment in the case where its acts had made it *dominus litis*, said of it:

> "The rule laid down in Robbins vs. Chicago City, 4 Wall., 657, seems to me fully applicable in this case. There the Court said:
>
> "'The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.'
>
> "Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit vs. Morgan, 7 Wall., 619; Miller vs. Liggett, etc., Co., 7 Fed. Rep., 91; Claflin vs. Fletcher, *Id.* 851; American Bell Tel. Co. vs. National Imp. Tel. Co., 27 Fed. Rep., 666; Morse vs. Knapp, 37 Fed. Rep., 352; Lea vs. Deakin, 11 Biss., 23, 13 Fed. Rep., 514; Wilson's Ex'r vs. Deen, 121 U. S., 525, 7 Sup. Ct. Rep., 1004.
>
> "The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case, made itself the *dominus litus* in

> that case: it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found; and may, I think, with entire propriety, be held to be bound, not only upon all the questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case."

On appeal the Court composed of Gresham, Woods and Jenkins, Judges, considered elaborately the contention that the *dominus litis* was not concluded because a new defense not involved in the former case was asserted, and rejected the defense because it might have been asserted in the former case.

Plumb vs. Crane, 123 U. S., 560, a case overlooked by the State Court, and by counsel in that Court, is a strong authority for *defendants in error*. The suit was by Goodnow, assignee of the Iowa Homestead Co., to recover taxes for back years on Des Moines river lands. Plumb was defendant below, and answered *prior adjudication in the suit of Iowa Homestead Co. vs. Des Moines Nav. R. R. Co., 17 Wall., 153*, as a bar to the action. His defense was denied on the ground that he was not a party to that suit. It appeared that Wade was the defendant *of record*, but that he was not the owner of the land covered by the taxes, having been a trustee thereof and sold the land, which was purchased for Plumb, who was then the owner. Plumb hearing of the suit had employed counsel who defended in the name of

Wade. He controlled Wade's defense, and bore the expense. This Court said of the judgment appealed from:

> "The judgment was not only against Plumb personally, but it was made a special lien on the lands, which were the subject of taxation, because he was actual owner at the time of the levy. . . . In this there was error, in our opinion. . . . If there had been a decree against Wade for the taxes and a lien therefor established on the lands, he would have been bound, and could not have resisted the enforcement of the lien. So, too, if a personal decree had been rendered against Wade for the money, it would have been conclusive in an action by Wade to recover from him money paid for his use in satisfaction of the decree. He was bound, because he was represented in the suit by Wade, under whom he claimed. This case is the converse of that of Litchfield's Admr. vs. Crane, *ante*, 199. There Mrs. Litchfield was not represented in the suit by anyone who was a party, and, therefore, she could not claim the benefit of the decree. Here Plumb was represented by Wade, and he stands, consequently, as if he had been himself a party by name."

What prevented plaintiff in error being heard? It is uncontroverted that it controlled the defense; that the nominal defendant was practically defunct, possessing only the franchise to exist; and that its President was the same man who was President of plaintiff in error; that it had no treasury, but that plaintiff's treasury defrayed the expenses of the prolonged litigation, resulting in the judgment which it now attempts to repudiate. The excuse offered for not setting up the defenses which it now declares that it possessed

is that the pleadings in the case were not appropriate, still it made no attempt to obtain a reformation of the pleadings. As controller of the defense made in the name of the L., C. & L. Co. it never at any time pleaded a defect of parties to compel defendants in error to amend their petition and make plaintiff in error a defendant by name, so that it might assert defenses, if any it had, in addition to what might be urged in the name of the L., C. & L. Co. Having absolute dominion of the defense there was no obstacle whatever to this course, but plaintiff preferred to urge only those defenses maintainable on the face of the pleadings as they stood, and even the litigation of those consumed nearly nine years.

Or, plaintiff in error, irrespective of the volition of the nominal defendant, L., C. & L. Co. (assuming that defendant had volition), had a right under the Kentucky Statutes to compel defendants in error to make it a defendant so that it might assert upon its own account, and in its own name, any defense it pleased to the attempt to subject to the lien of the mortgage the earnings of plaintiff's railroad. The Statute is as follows, Civil Code, Sec. 29:

> "In an action or proceeding for the recovery of real or personal property or for the subjection thereof to a demand of the plaintiff under an attachment or other lien, any person claiming a right to, or interest in, the property or its proceeds, may, before payment of the proceeds to the plaintiff, file in the action a verified petition, stating his claim and controverting that of the

> plaintiff; whereupon the Court may order him to be made a defendant; and upon that being done, his petition shall be treated as his answer. But if he be a non-resident he must give security for costs."

The decision in *Miller vs. Desha, 3 Bush, 212*, expounding a similar Kentucky Statute, is especially valuable in this connection. Miller had attached a slave as the property of defendant, Cromwell, whose daughter, Mrs. Desha, claimed the slave, and executed a forthcoming bond. Miller prevailed, and the slave was sold in satisfaction of the bond, whereupon Mrs. Desha sued Miller for the value of the slave. The Court, recalling the statute providing for the claimant presenting petition disputing the validity of the attachment, or asserting an interest in or lien upon the attached property, said that the object of the statutory provisions was to afford a summary remedy for the trial of such claims, and that the claimant failing to file a petition in the case asserting title, should neither sue the purchaser, nor judgment creditor,

> "Because, having executed the bond, he has legal notice that a suit is pending to subject the property, and if he remains quiescent as to his claim, until, by judgment, it is subjected to the attachment, he shall then neither be heard in the defense to the bond nor on a suit for the recovery of the money or the property."

Having, therefore, notice of the suit; indeed, having controlled the defense, and, having had an opportunity to defend either in the name of the L., C. & L. Co., or in its own name

also; and, having elected to defend in the name of the nominal defendant, instead of its own, plaintiff in error has not been denied due process of law; and, indeed, if it has lost the opportunity of any defense, it has been solely through its own fault.

Consequently, there would seem to be an end of discussion, and no occasion to consider the fine distinctions elaborated in the State Court, and now transferred to this Court. To meet the full issue presented, however, we shall briefly respond to the claims made by the defendant.

The State Court had Territorial Jurisdiction of the Subject Matter.

In the multitude of authorities invoked by the State Court to sustain its adjudication that plaintiff in error was a party to this suit, and bound by its result, the judgments were mostly *in personam*, and although conceding that it is bound by the adjudication in this suit on the principal questions involved, plaintiff in error contends that it is not concluded by the judgment to pay into Court the earnings ascertained by the judgment to be covered by the mortgage, because it declares that such judgment is *in personam* and not *in rem*.

A careful consideration of plaintiff's contentions seems to indicate that they are based upon a misconception of this Court's decision in *Pennoyer vs. Neff, 95 U. S., 714.*

Accordingly, we find plaintiff observing that we neither obtained an attachment nor applied for a receiver, and insisting that our proceeding was simply for an accounting.

Attachment was unnecessary, a mortgage lien already existing, and the suit being to foreclose the lien, it is "immaterial whether the proceeding against the property be by attachment or bill in chancery." (*Pennoyer vs. Neff.*) Nor is receivership essential to jurisdiction. On the contrary, the jurisdiction would be essential to receivership. An unsecured creditor is not entitled to receivership, but receivership presupposes lien.

> "And to warrant the interposition of a court of equity by the aid of a receiver, it is essential that the plaintiff should show first, either a clear, legal right in himself upon it, or that it constitutes the special fund out of which he is entitled to satisfaction of his demand." (*High Rec., Sec. 11.*)

In all the cases where this Court has appointed receivers at a mortgagee's suit, it has been in foreclosure proceedings in enforcement of mortgages. Such proceedings are *in rem*, and we shall hereafter refer to this point at length.

Without now discussing the distinction between proceedings *in personam* and *in rem*, it sufficeth to say that this proceeding is to subject property within the territorial limit of Kentucky, and, therefore, the doctrine of *Pennoyer vs. Neff*, by express declaration of this Court, does not assist plaintiff. This Court there condemned a statute providing

personal judgment enforcible everywhere, upon personal service outside the State; but said:

> "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a proceeding against property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

> "An agreement as to the produce of land will affect the land itself." Legard vs. Hodges, 3 Bro. C. C., 538.

The judgment of foreclosure might have been enforced by receivership of the earnings of the railroad.

The judgment in the State Court in our case affected only the earnings covered by the mortgage. The Court thus characterized its judgment:

> "In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington R'y Co. from and over the Cumberland & Ohio. If the averments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville, Cincinnati & Lexington R'y, by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit

in the name of the Louisville, Cincinnati & Lexington R'y Co.; and was a real defendant in this action. Assuming these averments to be true, the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action." (App. II. to former brief of Edmund F. Trabue, page 36.)

The exposition by the State Court of the nature of its judgment is treated by this Court as conclusive. (*Wood vs. Brady, 150 U. S., 221.*)

This Court there said:

> "The question whether an action to foreclose a lien of this kind is *in rem* or *in personam* under the practice in California is one upon which the decision of the Supreme Court is binding, and its ruling that plaintiff, being no party to defendant's suits to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them is not a proper subject for review by this Court."

This Court treats as equally conclusive the decision of the State Court as to the nature of a lien created by a mortgage. Indeed the construction of contracts affecting land is, according to the doctrine of this Court, solely for the State Court. In this instance the State Court not only treated the contract as creating a lien upon the earnings of the railroad in question, but for nearly nine years proceeded to enforce that lien

without a question being raised as to the nature or effect of the lien.

The State Court's declaration, so much commented on by plaintiff, that the judgment directing the L. & N. to pay into Court was "essentially *in personam*," is not only not inconsistent with the adjudication that the proceeding prior to the judgment of foreclosure was *in rem*, but is strictly accurate. A judgment enforcing a mortgage lien is *in rem*, but the procedure to execute the judgment is *in personam*, viz., by process of contempt, rule, attachment, etc. (Scott vs. Coleman, 5 Mon. (Ky.), 75; Kershaw vs. Thompson, 4 John Ch., 609.)

Instead, therefore, of showing a case within the principle ruling the decision in *Pennoyer vs. Neff*, plaintiff in error shows a case expressly declared therein to be excluded from the principle.

Summary Proceedings are Due Process.

We have shown that the requirement of due process does not forbid proceedings by motion any more than by action or suit, if only there be notice and opportunity to be heard. (*Iowa Central R'y Co. vs. Iowa*, *supra*.) But the most familiar instance of such proceedings is that by petition against *pendente lite* purchasers. On such petitions such purchasers are not permitted to reopen the litigation concluded by the judgment of foreclosure. The reason is two-fold:

First, there must be an end of litigation; *secondly*, the purchaser has already been heard through his vendor.

The purchaser *ante litem motam* is not concluded by the judgment of foreclosure nor liable to proceedings by petition unless he have had an opportunity to be heard.

The suggestion of the positions of the purchaser *pendente lite* and the purchaser *ante litem motam* and the reasons governing their rights demonstrates the propriety of the rule issued against plaintiff in error. It has had its day in Court by reason of being heard in its vendor's name, and having had full opportunity to be heard to any extent it pleased. Its opportunities, therefore, have been even greater than those of a *pendente lite* purchaser, and, being concluded by the judgment of foreclosure, there is no reason denying such purchaser an independent hearing that is not strictly applicable to plaintiff in error.

For this reason, also, the judgment against plaintiff in error on the rule to pay into Court the earnings in its hands covered by the mortgage, is as obviously proper as the judgment against any tenant in possession of mortgaged property, real or personal, having had opportunity to be heard.

THIS IS A PROCEEDING IN REM.

The entire argument of plaintiff in error is based upon a statement of the nature of the action, which we maintain is absolutely without foundation.

The opening sentence of his brief is:

> "The question involved in this case is simply this: Where a personal judgment is entered against A. B. for

a specified sum of money, can an execution or a rule to pay the same be issued therein against C. D., who is not named in the judgment, and is not even a party to the cause? And if this is done and C. D.'s property is taken to satisfy the judgment, is this due process of law?"

Now we say "that the question involved in this case" is exactly the opposite of that.

We do not seek in this action to recover a personal judgment against anybody.

It is a proceeding *in rem.*

The object of the action is to subject the earnings of the railroad company to the payment of the interest on our bonds under a duly recorded mortgage, which not only gives us a lien upon those earnings, but provides expressly that these identical earnings shall be applied as they accrue to the payment of the coupons of the bonds as they mature.

The petition and amendments, R. P's., 2 and 69, set up in apt terms the lease and mortgage under which our lien was created, and ask for an accounting; that the case be referred to the Commissioner to ascertain the earnings covered by our lien, and when ascertained, that they be paid into Court and applied to discharge the interest on our bonds in accordance with the terms of the mortgage.

Plaintiff in error seeks to avoid the effect of our claim by saying that you have not attached these earnings nor taken possession of them through a receiver, and therefore your right to enforce your lien on the earnings has not been per-

fected. And on page 30 of the brief it is said: "Pending the litigation the possession of the property was left undisturbed with the rights in the possessor to collect and use the earnings thereof."

The whole trouble in this controversy grows out of an utter disregard or misconception of the terms of our mortgage by the railroad company. It has proceeded on the idea that this is an ordinary railroad mortgage of earnings, with the usual provision that after default for such a length of time in paying interest on the bonds, the trustee for the bondholders may demand or take possession of the road and operate it for the benefit of the bondholders, or the earnings may be intercepted through a receiver.

Because in every such mortgage there is either an express or implied covenant that the railroad company, as long as it retains possession of the road, shall receive and apply the earnings for operating expenses and other purposes as the railroad company, in its discretion, may see fit.

This grows out of the nature of the railroad business—the necessity for the use of its income. Hence, its mortgages are usually drawn in that form.

But our mortgage is exactly the opposite of that. It denies the right of the railroad company to use as it pleases the earnings covered by the mortgage. On the contrary, it provides that from the maturity of the first coupon until the payment of the last bond and coupon, *and whilst the railroad company remains in possession of the road*, these earnings, *as*

they accrue, shall be applied to the payment of the coupons *as they mature.*

Our right to enforce our lien on the earnings, as we have done in this case, under such a mortgage, we think is well established.

In case of Ketchum vs. St. Louis, 101 U. S., 306, where, under an act of the General Assembly of Missouri, the county of St. Louis loaned its bonds to amount of $700,000 to the Pacific Railroad Company, under an agreement that the interest should be paid out of the earnings of the road, this Court held (opinion by Mr. Justice Harlan) that it created an equitable lien or charge in favor of the county upon the earnings of the road to the extent necessary to meet the interest upon the bonds as it accrued. The Court further held that where the road was placed in the hands of a receiver, in a suit to foreclose a subsequent mortgage, the lien or charge in favor of the county was enforceable, not only against the funds in the hands of the receiver, but against a purchaser under the decree, and against whosoever may hold the road or have the custody of its earnings.

The Court rested its opinion upon this proposition of law that

> "If a debtor by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands or to come into the hands of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties, and upon all persons

with notice, who subsequently claim an interest in the fund under the debtor."

The case at bar is much stronger than that, for we have not only an express covenant in the mortgage by the Railroad Company that it will appropriate and apply these particular net earnings, as they accrue, on business coming to it from the Cumberland & Ohio Road to the payment of the interest on these bonds as it matures, but also a lien is given the bondholders on these identical earnings to place the security beyond peradventure, and this mortgage was duly recorded, giving notice to all the world.

Mr. Justice Harlan also quotes with approval in that opinion the following authorities:

In Legard vs. Hodges, 1 Ves., 478, Lord Thurlow said:

"I take this to be a universal maxim that wherever persons agree concerning any particular subject that in a court of equity as against the party himself, and any claiming under him voluntarily or with notice, raised a trust." . . . and "I take this to be true that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement."

And Pinch vs. Anthony, et al, 8 Allen (Mass.), 536:

"It is well stated that a party may by express agreement create a charge or claim in the nature of a lien on real estate as well as personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also as to third

persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulation, such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it."

In the case of United States Trust Co. vs. Wabash Railway (opinion of Court by Mr. Justice Brown), 150 U. S., page 306, this Court said:

"But the mortgage or deed of trust to the Trust Company, the petitioner did not purport to convey any of the incomes or earnings of the road, but provided that if default should at any time occur in the payment of interest, the trustee should, when requested to do so, take possession of the mortgaged property and operate the same and collect and receive all the tolls and income therefrom, and it was also provided that until such default the mortgagors should be entitled to have and to hold the possession of the railroad and collect, receive and retain all the revenues arising from its use." . . . "*Now if the mortgage had covered the earnings and rentals of the property, and those had constituted a part of the estate conveyed to the Trust Company as security for the bonds, there would be some reason for saying that it would be entitled to these earnings and rentals in this action, before it demanded possession of the road.*"

"But where the mortgage provided that the mortgagor should remain in possession until default, but when default occurs, the trustee may enter, this Court has held that the trustee can only secure the earnings of the mortgaged property by taking or demanding possession."

The Court, in support of that opinion, then quotes from the case of Galveston Railway vs. Cowdrey, 11 Wallace, 459, where it was held:

> "That even where the mortgage covered the tolls, income and profits of the railroad whenever the company should be in default of payment, but a subsequent clause that in case the company should be in default in payments of principal or interest for three months, the trustee should take possession of the road and collect and receive the tolls, income and profits, etc., it was held that until regular demand was made for the payment of tolls and income, the defendants were not bound to account therefor."

This is as far as the courts have gone. And in every such case, as far as we have been able to discover, the opinions of the courts are based upon the ground that in ordinary railroad mortgages, even where the income or earnings are mortgaged in general terms, there is an express or implied agreement that the railroad company shall remain in possession and receive the income or earnings and apply them for its own purposes as it shall see fit, until there has been default made in the payment of interest and possession taken by and through the trustee or receiver.

But we have been unable to find a single case, and doubt if one has ever been or can be found, where any respectable court has held that where the mortgage gives a lien upon the earnings and provides in express terms that the railroad company *itself* shall appropriate and apply these earnings *as they*

accrue to the payment of the coupons on the bonds *as they mature*, that it was necessary or proper in order to accomplish this purpose for the bondholders to take possession of the road or fund, either through the trustee or a receiver.

It is manifest from the opinion of Mr. Justice Brown, just quoted, that he did not consider it necessary to take possession in order to entitle the bondholders to receive the earnings under such a mortgage.

His language is:

> "Now if the mortgage had covered the earnings and rentals of the property and those had constituted a part of the estate conveyed to the Trust Company as security for the bonds, there would have been some reason for saying that it would have been entitled to recover these earnings and rentals in this action before it demanded possession of the road."

The doctrine for which we are contending was again announced by this Court in the case of Freedman Savings Co. vs. Shepherd, 127 U. S., page 502. Opinion by Mr. Justice Harlan. The Court says:

> "*It is of course competent for the parties to provide in the mortgage for the payment of rents and profits to the mortgagee, while the mortgagor remains in possession.* But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he

takes actual possession or until possession is taken in his behalf by a receiver."

The general rule on this subject is that stated in the American and English Encyclopedia of Law, Vol. 19, page 208, under head of "Railroad Securities:"

> "If the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession, they are not subject to the liens of the mortgage so long as they are allowed to remain in the possession of the mortgagor."

But in a foot note to that page of same volume the well-known exception to that rule is most clearly stated in the case of Pullan vs. Cincinnati, etc., R. Co., 5 Biss, U. S., 237, as follows, to-wit:

> "Notwithstanding the general rule that the mortgagor is entitled to the earnings and profits of the mortgaged property while in possession or until some action is taken by the mortgagee, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee and under such a contract, such income whenever received is operated upon by the mortgage, and the party receiving it *holds it in trust for whoever in equity is entitled to it.*"

That it may be seen at a glance that our mortgage comes within the rule contended for, we here copy it in full:

> "This indenture of a mortgage, made and entered into by and between the Louisville, Cincinnati & Lexington R'y Co., a railway corporation under the laws of

the State of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part:

"Witnesseth, That, whereas, by authority of an act of the General Assembly of the Commonwealth of Kentucky, approved the 18th day of March, A. D. 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio R. R. Co. for the lease, construction and operation of the latter company's line of road from Eminence, in Henry county, Ky., through a part of said county and the counties of Shelby, Spencer, and into Nelson county as far as Bloomfield, all in the State of Kentucky, said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein that if the net earnings of said leased premises do not prove sufficient to pay the interest and to provide for the sinking fund of three hundred and fifty bonds of $1,000 each, bearing interest at the rate of seven per cent. per annum, payable half-yearly, on the first days of June and December, and having twenty years to run from the 2d day of July, A. D. 1879, to be issued by said Northern Division of the Cumberland & Ohio R. R. Co.; and if all other sources of raising money of said Northern Division of the Cumberland & Ohio R. R. Co. fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed, on its own lines which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio R. R. Co.; and whereas, said contract or lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulations as to said net earnings.

"Now, in consideration of one dollar cash in hand paid by second party to said first party and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio R. R. Co., to the said Joshua F. Speed, as trustee, aforesaid (who is the trustee in the mortgage made by said Northern Division of the Cumberland & Ohio R. R. Co. to secure said three hundred and fifty bonds of $1,000 each), conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio R. R. Co. prove insufficient, will supply the deficiency, so far as it may be done, by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio R. R. Co.'s lines, for the purpose of discharging said interest and sinking fund as they severally fall due.

"In testimony whereof, the said first party, acting under the authority and approval of the stockholders, duly assembled in stockholders' meeting on the 28th day of July, 1879, has caused these presents to be signed in duplicate, in its corporate name, by its President, and countersigned by the Secretary, and its corporate seal hereto affixed this 28th day of July, A. D. 1879."

This mortgage made in this way was not the result of accident, but grew out of a peculiar state of facts.

The railroad company desired to construct this little railroad in Kentucky, known as the Cumberland & Ohio,

Northern Division, running a distance of about thirty miles from Shelbyville to Bloomfield, in order to operate it as a feeder to and in connection with its own lines, running from Shelbyville to Louisville, Lexington and Cincinnati.

In order to raise money to build the road, in addition to county subscriptions, it was proposed that bonds should be issued to the amount of $250,000, to be secured by a first mortgage on this Cumberland & Ohio road. The trustee named in this mortgage was Joshua F. Speed. He at once saw that a mortgage on this little branch road would be of no value to secure the payment of interest on the bonds, and the bonds, as they matured. It was evident that it would not pay even operating expenses, but, as a feeder to the Nashville Railroad system it would be of great value, so that Mr. Joshua Speed, trustee, proposed to the railroad company that, in order to induce these bondholders to invest in the bonds, the railroad company should guarantee the payment of the bonds and interest, and the railroad company agreed to it. But, when the contract was about to be consummated, the attorney for the railroad company advised that, under the amended charter of the company, it could not guarantee the bonds of another corporation, but that, in lieu of that, it was competent for the railroad company to mortgage the earnings on its own lines on business coming to it from or over the Cumberland & Ohio Railroad Company, Northern Division, and, in pursuance of this, and, as a substitute for the guarantee, this mortgage was executed.

In view of this, how preposterous is the contention that, in order to entitle us to these earnings, we must take out an attachment or have a receiver appointed. The agreement under the mortgage was express that the railroad company, *while it was in possession*, would itself, *as the earnings were received*, apply them to the payment of the coupons *as they matured*. Thereby the railroad company constituted itself as a receiver or trustee for the bondholders by the express terms of the contract. And if the bondholders had gone into court and had a receiver appointed, all that the receiver could have done would be to do as the railroad company had agreed to do—to receive these earnings as they accrued and appropriate and apply them to the payment of the coupons as they matured.

But the railroad company says, "You can't enforce your lien upon these earnings, because it is money and has no *ear marks*."

That is another fatal mistake the railroad company makes. Our mortgage is upon particular earnings that can be ascertained with mathematical certainty. The mortgage is upon the net earnings that the railroad company makes on business coming to it from or over the Cumberland & Ohio Railroad Company (Northern Division.) There is no dispute whatever as to what these earnings are. The railroad company furnishes them to us in exact dollars and cents, and we admit the accuracy of its statement. The only controversy that has ever been in this case has been as

to the amount of the *operating expenses proper to be deducted* from these earnings in order to show the amount of net earnings covered by our lien under the mortgage.

The first report of the Commissioner, under the instructions of the Court that there should be deducted from the gross earnings of the Cumberland & Ohio business only such additional expense as was entailed by the handling of this business, showed net earnings covered by our lien amounting to $213,590.28. (See record, page 62.)

But the Court finally allowed to be deducted from our fund, as operating expenses, a certain proportion of the expenses of the entire Louisville & Nashville Railroad system, including the President's salary and terminal facilities in New York City, thus leaving the net earnings on business coming from the Cumberland & Ohio Road, which our lien covered, only $60,192.27. (See record, page 65.)

And when this was ascertained, it was the identical fund which our mortgage covered. It was derived from the source designated in the mortgage, with an express condition in the mortgage that this identical money should be appropriated and applied to pay our coupons as the interest on the bonds matured. *Id certum est quod certum reddi potest.* It was nothing like an agreement by the railroad company to pay this interest out of its moneys or earnings generally.

But this particular fund, from this particular business, was put in lien and appropriated for this particular purpose, and it won't do for the railroad company to say "we have

mingled this fund with our moneys generally and thereby destroyed its ear marks." It was your duty to keep this fund separate as covered by our lien under the mortgage, and a court of equity will treat it as having been done, and enforce our lien upon the fund, when the amount is ascertained; and we have ascertained it by the figures you furnished yourself to the exact amount of dollars and cents.

The proceeding to enforce this lien is a proceeding *in rem*, as sustained by the authorities referred to in our former brief, and as expressly decided by our Court of Appeals; and all that the Nashville Railroad Company was entitled to was notice of the proceeding.

Mr. Milton Smith was President of both the L., C. & L. and the L. & N., and the Louisville & Nashville Railroad Company not only owned all the stock of the L., C. & L., but had bought and owned the road itself. Mr. Milton Smith was served with summons in this action, so that the Louisville & Nashville Railroad not only had actual notice of this proceeding, but admits that it has been operating all of these railroads and received all the earnings which are the subject-matter of controversy in this action, and has defended this suit in the name of the L., C. & L. Railroad (which it had previously bought and owned and still owns), and has employed the counsel and defrayed the entire cost of the defense, and conducted the litigation from beginning to end; and the President of the L. & N. has given a lengthly deposition in the action (Record, pages 184 to 190 inclusive), and on page

190 he undertakes to show that the report of his own Auditor, Sewell, allowing us net earnings from December 1, 1882, to June 30, 1890, of $60,192.27, which is the basis of the judgment, was erroneous; and speaks of these earnings as having been derived by the L. & N. and points out the enormous cost of operation which should be deducted. In other words, the President of the Louisville & Nashville Railroad Company brings his company into this action—even if it had not been served with notice—and for fourteen years defends this suit, and controverts our right to these earnings, covered by the lien, which it admits are in its own possession; and after judgment has been rendered, ascertaining these earnings covered by the lien and directing them to be paid into Court, in order to pay the matured interest, the Nashville Railroad Company, who has been the real defendant all the time, with our money in its pocket, says, after fourteen years or five thousand days (except Sundays) of the most stubborn and expensive litigation ever seen in the records of any court, (when the only question was or could be, which of us is entitled to this money?) I have never had any day in Court. Therefore, we are about to be deprived of our property without due process of law, and that is the Federal question we raise.

The only point upon which plaintiff in error and the defendants have ever agreed in this action is: That in all the ages that are past, there has never been found in any text book or adjudged case, one like this. And we do not believe

that in the ages to come there will ever be another, where a person or corporation admits of record that he has defended a suit for fourteen years and still claims that it never had a day in Court.

We ask the Court to read this brief in connection with the others heretofore filed by us on the motions to affirm or dismiss, and we respectfully ask an affirmance of the judgment of the State Court.

JOHN G. SIMRALL,
EDMUND F. TRABUE,
Counsel.

TEMPLE BODLEY,
JAMES S. PIRTLE,
JOHN C. DOOLAN,
BEN. F. WASHER,
of Counsel.

Office Supreme Court U. S.
FILED
MAR 14 1900
JAMES H. McKENNEY,
Clerk.

No. 178.
Sup. Ct. of Tenn.
for D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 14, 1900.

No. 178.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ADOLPH L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE FOR THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND AND OHIO RAILROAD COMPANY, ET AL., DEFENDANTS IN ERROR.

Supplemental Brief for Defendants in Error.

I.

For additional authorities on due process of law, as applicable to this case, see:

Wilson vs. North Carolina, 169 U. S., 594; *Laing vs. Rigney*, 160 U. S., 531; *Central Land Company vs. Laidley*, 159 U. S., 112; *York vs. Texas*, 137 U. S., 15

II.

A prosecuting witness was adjudged liable for costs, although having no issue with any one, the verdict in favor of the accused finding (under Kansas statute) that the prosecution was with malice and without probable cause.

Lawe vs. Kansas, 163 U. S., 81.

III.

Mr. Helm's claims based on *section 90* of the Kentucky Code and on the New Jersey case concerning the scope of a judgment are matters for the consideration of the State court.

And the claim of a denial of *due process* was refuted by Mr. Justice Peckham's inquiry of Mr. Helm how the L. & N. Co. could have been denied *due process* or *opportunity to be heard* when it *had never attempted* to assert any defense that an opportunity to try it had not been afforded, and the laws of Kentucky procedure gave opportunity for assertion of any defense it chose to make.

IV.

Our position in regard to *Plumb vs. Crane*, 123 U. S., 560, is correct, as is shown in *Litchfield vs. Goodnow*, 123 U. S., 550, where this court said Mrs. L. was not represented by any party of record, and *therefore* no judgment could have been pronounced either in her favor or against her.

Mr. Bruce's suggestion that the principles governing the rights of Plumb were like those controlling the rights of *pendente lite* purchasers is sound. We make same suggestion as to L. & N. Co., and the analogy is complete (Brief, pp. 25, 26).

Pendente lite purchasers are bound, *first*, that there may be an end of litigation; *secondly*, because they have had

their day in court through their vendors. The reasons apply equally to *L. & N. Co.* and to *Plumb.*

We showed in the brief (pp. 21 to 26 and 31, 32, 33, and 34) that our mortgage covered certain earnings or income of the railroad of plaintiff in error (95 *Ky.*, 291).

That the State had so decided, and that this court treats such decisions as conclusive.

We might also have remarked that a mortgage of the income is, *pro tanto*, a mortgage of the thing producing the income.

Ketchum vs. St. Louis, 101 U. S., 306.
Legard vs. Hodges, 1 Ves., 478; 3 Bro. C. C., 538.

Lord Coke (1 Thomas Coke-Lyttleton, 238) says:

g. "But if a man, seized of lands, in fee, by his deed "granteth to another *the profit of those lands*, to have and to "hold to him and his heirs, and maketh livery *secundum* "*formam chartæ, the whole land itself doth pass; for what is* "*the land but the profits thereof;* for thereby vesture, herbage, "trees, mines, and all whatsoever, parcel of land doth pass."

h. "By the grant of the *boilery of salt*, it is said that the "soil *shall pass, for it is the whole* profit of the soil."

The contention of plaintiff in error, therefore, comes to this, that even if a mortgage on its railroad might be enforced in a case like this *without denying to it due process of law*, and although a mortgage upon the income might operate as a mortgage on the railroad producing it (or be so held by State court, and its judgment be conclusive thereof), yet to enforce the mortgage on the income would *deny due* process.

Very respectfully,

JOHN G. SIMRALL,
EDMUND F. TRABUE,
Counsel for Defendants in Error.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* SCHMIDT.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 178. Argued March 12, 13, 1900. — Decided April 9, 1900.

The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein; and all its requirements are complied with provided that in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.

The mere fact that in this case the proceeding to hold the Louisville and Nashville Company liable was by rule does not conflict with due process under the Fourteenth Amendment, since forms of procedure in state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied.

Although the Louisville and Nashville Company appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character except the set-off was pleaded or suggested in any form, and this court cannot be called upon to conjecture that defences existed which were not made, and to decide that proceedings in a state court have denied due process of law because defences were denied when they were not prosecuted.

THE three corporations directly or indirectly involved in this controversy are the Northern Division of the Cumberland and Ohio Railroad Company, the Louisville, Cincinnati and Lexington Railway Company and the Louisville and Nashville Railroad Company. In order to abbreviate we shall refer to them respectively as the Cumberland and Ohio, the Cincinnati and Lexington and the Louisville and Nashville.

On July 2, 1879, the Cumberland and Ohio mortgaged its road to secure its certain negotiable bonds.

On July 28, 1879, the Cumberland and Ohio leased its road for thirty years to the Cincinnati and Lexington. The lease provided that if the earnings of the Cumberland and Ohio proved inadequate to pay the interest on the bonds, secured by the mortgage above referred to, the lessee, the Cincinnati and Lex-

ington, would "supply the deficiency so far as it may be done by appropriating the net earnings, or so much as may be needed, on its own lines, which may accrue by reason of business coming to it from or over said first party's line." The lease provided that the lessee, the Cincinnati and Lexington, should not assign the contract without the consent of the lessor, the Cumberland and Ohio. Contemporaneously with the execution of the lease and in order to secure the carrying out of the stipulation providing for the application of certain stated earnings of the Cincinnati and Lexington to the payment of the interest on the bonds of the Cumberland and Ohio, the former corporation executed a mortgage in favor of the bondholders of the Cumberland and Ohio, hypothecating the net earnings on the Cincinnati and Lexington arising from business coming from the leased line. Although the Cumberland and Ohio did not abandon its corporate life and preserved its formal existence, all its railroad and appurtenances as a result of the lease passed from its own to the control of the Cincinnati and Lexington.

In November, 1881, the Cincinnati and Lexington conveyed all its property to the Louisville and Nashville, and made to the latter an assignment of the lease of the property of the Cumberland and Ohio. Despite the fact that the assignment of the lease was not approved by the original lessor, the Cumberland and Ohio, as provided in the lease, the Louisville and Nashville took control of both the roads of the Cincinnati and Lexington and Cumberland and Ohio, and operated the same, reaping all the revenues of every kind arising therefrom. In 1885, default having supervened in the payment of the interest on the bonds of the Cumberland and Ohio, issued and secured as above stated, the trustee under the mortgage commenced proceedings against the Cincinnati and Lexington to enforce the mortgage on net earnings derived from business of the Cumberland and Ohio. It is not denied that at the time the action was commenced the fact of the transfer of the property of the Cincinnati and Lexington and the assignment of the lease of the Cumberland and Ohio to the Louisville and Nashville was known to the trustee. However, the Cincinnati and Lexington was the only party made defendant. The relief

sought was a discovery of the amount of net earnings, derived from business coming from the Cumberland and Ohio, and a decree for the amount, when ascertained, for the benefit of the mortgage bondholders. A most protracted and hotly contested lawsuit ensued. The question of earnings coming to the Cincinnati and Lexington from business over the Cumberland and Ohio was thoroughly explored by reports, expert examination of books, testimony, etc., resulting in what is denominated by counsel for the plaintiff in error in their brief as a "wilderness of figures." At last a final decree was entered fixing the earnings which under the contract were attributable to the mortgage creditors of the Cumberland and Ohio, at the sum of $53,565.62, which the defendant was ordered to pay into court with interest by a day stated. The sum not having been paid a rule was taken on the defendant to compel performance, and in response it was answered:

"That in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it."

The sale referred to in this answer being that which had been made by the Cincinnati and Lexington of all its property, including the assignment of the lease held by it from the Cumberland and Ohio to the Louisville and Nashville. In reply to a rule taken on the defendant to report the amount of net earnings which had accrued subsequent to the period embraced by the decree for $53,565.62, the defendant said:

"States and shows to this court that it has not made any net earnings, or earnings of any kind, since the date aforesaid, on business coming to it from or over the Cumberland and Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid."

Thereupon the plaintiff sought leave by an amended and supplemental petition to make the Louisville and Nashville a party defendant to the cause. Among others the following averments were contained in the petition:

"Plaintiffs state that prior thereto the said Louisville and Nashville Railroad Company had purchased and acquired and at the time of said conveyance held the capital stock of the said Louisville, Cincinnati and Lexington Railway Company, and as such stockholder took and appropriated and has ever since enjoyed the whole purchase price of the Louisville, Cincinnati and Lexington Railway Company and all its said properties.

"Plaintiffs state that after the execution of said deed of November 1, 1881, said Louisville and Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati and Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern Division of the Cumberland and Ohio Railroad Company aforesaid, and began to operate and has ever since operated said railroads and properties and taken and appropriated to its own use the earnings thereof.

"Plaintiffs state that at all times since November 1, 1881, said Louisville and Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by virtue thereof, has operated the said Northern Division of the Cumberland and Ohio Railroad and the said Louisville, Cincinnati and Lexington Railway and properties, and has made all the earnings mentioned and proved in the reports of the several commissioners in this case, and ascertained and adjudged in the several judgments of this court, and finally adjudged in the opinion and judgment of the Court of Appeals herein, all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati and Lexington Railway Company.

"Plaintiffs further state that the Louisville and Nashville Railroad Company at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati and Lexington Railroad Company actually knew all the provisions of the

lease, mortgages and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties therein referred to, in accordance with said lease, mortgages and contracts, from the time of its said purchase until the 1st day of April, 1883, and knew at all times, including the time during which this action has been pending, that it had operated said railroad and all the other property of said Louisville, Cincinnati and Lexington Railway Company, and of the Northern Division of the Cumberland and Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation of the railroad and properties of the Louisville, Cincinnati and Lexington Railway Company and the Northern Division of the Cumberland and Ohio Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati and Lexington Railway Campany, and filed all other papers which were filed herein on behalf of the defence, and itself employed counsel in this case to make defence in the name of the Louisville, Cincinnati and Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defence of this action, and has been in court defending this action and has controlled the defence thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the — day of ——, 1885, and from the time the said Louisville and Nashville Railroad Company caused the answer to said petition to be filed herein on the — day of ——, 1886."

The leave to file was denied on the ground that it was too late to do so after judgment. This order, refusing to allow the amendment, was affirmed by the Court of Appeals of the State of Kentucky. That court, however, in its opinion intimated that the amendment was not necessary if the averments of the supplemental and amended petition were true, and that under the facts the Louisville and Nashville might be proceeded against by rule to show cause. 99 Kentucky, 143. Following the path thus pointed out by the Court of Appeals, a rule in the lower

court was applied for to compel the Louisville and Nashville to pay the amount of the judgment. The court considered the suggestion which had been made, in the opinion of the Court of Appeals, as not binding on it, and hence declined to allow the rule on the ground that the Louisville and Nashville not having been named as a defendant in the proceeding could not be by rule condemned to pay the judgment. The Court of Appeals reversed the order of the trial court and directed the rule to issue as prayed for. The court in effect held that as the affidavit by which the rule was supported in substance charged that the Louisville and Nashville prior to and during the entire suit had operated the roads from which the revenues accrued which were in controversy, and that that corporation had in substance volunteered in the cause to defend the same in the name of the technical defendant; had carried on the defence through its own counsel, had paid all the expenses of the litigation; the officers of the corporation which was technically a defendant being the officers of the Louisville and Nashville, therefore, the Louisville and Nashville had had under the laws of Kentucky due notice of the suit, and ample opportunity to defend, in fact had actually carried on the defence, and could hence be condemned by rule to pay the judgment. The trial court thereupon entertained and issued the rule, which was served on the Louisville and Nashville. That corporation for answer to the rule said, among other things:

First. "That it is not a party to this suit. It has not been named in any pleading in the case as a party, and there is no averment made in any pleading in the case against this respondent, or that is applicable to this respondent, and no judgment or order has ever been entered in this case against this respondent, and no process has ever issued against or ever been served on this respondent."

Second. "There has never been a time from the institution of this suit up to this time when this respondent could, with propriety, have filed an answer setting up its defences against the alleged claim of the plaintiff, and to require it now to pay into court upon this rule the amount stated in the rule, or any other amount, would be to deprive this respondent of its prop-

erty without due process of law, contrary to the Constitution of the United States in such cases made and provided."

The answer then pleaded a set-off to the amount of $16,524.37, which it was claimed the Louisville and Nashville should be allowed if it was held bound to pay the judgment. The conclusion of the answer was as follows: "Wherefore having fully responded, this respondent prays that the rule herein be discharged." The court, having expressed in a careful opinion its view that the Louisville and Nashville could not be condemned, by rule, because it had not been a technical party to the record, nevertheless, considering itself bound by the action of the Court of Appeals, made the rule absolute, and entered a decree against the Louisville and Nashville Railroad, condemning it to pay the judgment, subject to the set-off which had been pleaded in the answer to the rule, and this judgment was affirmed by the Court of Appeals of the State of Kentucky as a delay case. By an allowance of a writ of error the cause is now here for review.

Mr. Helm Bruce and *Mr. James P. Helm* for plaintiff in error. *Mr. H. W. Bruce* was on their brief.

Mr. John G. Simrall and *Mr. Edmund F. Trabue* for defendant in error. *Mr. Temple Bodley*, *Mr. John C. Doolan*, *Mr. Benjamin F. Washer* and *Mr. James S. Pirtle* were on their brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *Wilson* v. *North Carolina*, 169 U. S. 586.

The claim of the plaintiff in error (the Louisville and Nashville) is that the decree rendered against it did not constitute due process of law, first, because it had no notice of the suit, it not having been summoned as a party defendant; and, second, that as it was not made a nominal party defendant and served with process as such, it had no adequate opportunity to make defence. In support of the second contention various provisions of the Kentucky law have been referred to in the argument, from which it is deduced that the Louisville and Nashville would have been without right in the proceeding brought, not against it, but against the Cincinnati and Lexington, to make defences which may have appertained and been relevant to the Louisville and Nashville, and might not have related to the Cincinnati and Lexington, the party defendant on the record. But the answer to these contentions is that the necessary effect of the opinion and decree of the court of last resort of Kentucky, is to hold, first, as a matter of fact, that, although not a technical defendant, the Louisville and Nashville became voluntarily, in the name of the Cincinnati and Lexington, the real, although not the nominal, defendant in the cause, and during the long years of this protracted litigation was in legal effect an actor in the courts of Kentucky seeking, by every possible means, to defeat the claim of the plaintiff. The conclusions of fact found by the court of last resort of Kentucky are not subject to reëxamination by this court. Clearly, also, the inevitable result of the conclusion of the Court of Appeals of Kentucky is that it was the duty of the Louisville and Nashville, having come in voluntarily in the cause to defend its interest, under the name of the technical defendant, if it had defences which were personal to itself, to have made such an appearance on its own behalf as to enable it to make them, and that the statutes of Kentucky not only authorized this course, but obliged the Louisville and Nashville to have followed it. Accepting as we do the interpretation placed by the courts of last resort of Kentucky on the law of that State, the contention of the plaintiff in error is at once demonstrated to be without merit. Besides the conclusiveness of what we have just said, there is another view which is equally decisive. The record shows no offer of any defence whatever, by

the Louisville and Nashville, which was refused by the courts below. On the contrary, every defence made is shown to have been entertained, fully considered and to have been ultimately decided. The argument then reduces itself to this: That one who has voluntarily appeared in a cause and actively conducted the defence is to be held to have been denied, by the courts of the State, the right to make a defence which was never presented. Moreover, even if we put out of view altogether all the proceedings had in the original cause during the many years when the suit was pending, and confine our attention solely to the events which took place after the application for the rule to show cause, on the Louisville and Nashville, the same conclusion is rendered necessary. It is undoubted that the Louisville and Nashville was made a party defendant to the rule in the most technical sense, and was actually served. It made answer and asserted its set-off. The mere fact that the proceeding to hold it liable was by rule does not conflict with due process under the Fourteenth Amendment, for, as we have seen, forms of procedure in the state courts are not controlled by the Fourteenth Amendment, provided the fundamental rights secured by the amendment are not denied. But it is argued whilst it is true the effort by rule to enforce responsibility for the judgment did not violate the Fourteenth Amendment, and service of the rule was adequate notice, yet no opportunity to defend was afforded, because all right to defend had been cut off by the previous judgment. In effect it is asserted the rule summoned the corporation to show cause why it should not pay a judgment to which, under the previous decree, there was no right on its part to make any defence whatever. In other words, it is said the right to proceed by rule was upheld by the Kentucky court because the Louisville and Nashville was bound by the judgment and therefore the rule rested on an assumption which precluded the setting up of any defence to it. But the answer to this argument is plain. Although the Louisville and Nashville appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character, except the set-off, was pleaded or suggested in any form whatever. The argument, therefore,

asks us to say that the Louisville and Nashville in the proceeding in which it was duly served, and to which it responded and as to which it had its day in court, was deprived of defences which it never asserted, and that due process of law was not administered to it because it was unheard in respect to matters concerning which it made no claim. But this court cannot be called upon to conjecture that defences existed which were not made and to decide that proceedings in a state court have denied due process of law because defences were denied, when they were not presented. And especially must that be so where the court of last resort of the State, on review of all the proceedings, has held that full opportunity to make every defence was afforded. True it is that in *Rees* v. *City of Watertown*, 19 Wall. 107, 123, it was said: "Whether in fact the individual has a defence . . . is not important. To assume that he has none, and therefore that he is not entitled to a day in court, is to assume against him the very point he may wish to contest." But this truism was stated with reference to a case where it was argued that a condemnation without notice could be justified on the assumption that if notice had been given no defence could have been made. Manifestly, the principle can have no application to a case where there was notice, and the presumption which we are asked to invoke is that although no defences were pressed they may have possibly existed.

Affirmed.